Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAMAL SHUFLER[1]
Petitioner,

v.

JUDY SHUFLER
Respondent

Petition for a Writ of Certiorari to the
Delaware Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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[1] The above are pseudonyms used by the Delaware Supreme Court in its decisions in this case.

QUESTION PRESENTED

Whether the Delaware Family Court and Delaware Supreme Court erred in concluding that Petitioner's rights under the United States Constitution, Amendment XIV were not violated and he was not denied due process of law nor was he denied equal protection of the law when the Family Court reduced Petitioner's percentage of overnight custody during the school year with the parties' children from 50% to 29% without allowing Petitioner to fairly and fully present his case, by exhibiting bias toward Petitioner and engaging in an arbitrary and capricious processes.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Delaware Supreme Court.

The Appellant is Jamal Shufler, a citizen of the United States and the State of Delaware.

The Appellee is Judy Shufler, a citizen of the United States and the State of Pennsylvania.

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JURISDICTION

The Delaware Supreme Court enter its decision on reargument on June 1, 2007, affirming its decision of May 8, 2007. This Court has jurisdiction under the United States Constitution, Amendment XIV, section 1.

STATUTES INVOLVED

This case involves the provisions of the State of Delaware Domestic Relations Law, 13 Del. C. § 701, et. seq. The pertinent provisions are reproduced in the Appendix at A-72.

STATEMENT OF THE CASE

This case is a very important case as it deals with parents' rights regarding custody of their children, and those parents' rights to equal protection and due process in those cases involving the one thing most important to parents, their children.

The Trial Court, the Family Court of the State of Delaware, repetitively, callously, and egregiously denied Father's due process of law and equal protection under the law, as will be explained below.

The Trial Court on an interim basis reduced Father's custody (defined here as over-night time during the school year) with the children from 50%, a schedule the parties had lived under for almost seven years, and had agreed upon by formal mediation agreement, to 43%, in its April 21, 2005 interim decision. In its final decision the Court reduced Father's time to 29%, (that is from seven out of each fourteen days, to six out of each fourteen days, to four out of each fourteen days.) The Delaware Supreme Court twice affirmed the Family Court's decision without commenting on even one fact of the case, or citing even one authority for its affirmance. The Family Court also failed to follow Delaware law in awarding excessive attorney fees without any explanation of its arithmetic calculation, to Mother and against Father, which similarly was affirmed twice by the Delaware Supreme Court without stated reliance upon any facts or authorities, or comprehensive explanation.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

1. Introduction

In this case, there were thirteen hearings over almost two years from July 26, 2004 to April 28, 2006 involving thirteen witnesses, many of whom testified two or three times. This statement of facts and proceedings below will address only the most important violations of Father's rights.

On October 28, 2003, Mother filed a Petition for Custody of the parties' minor daughter, Esther[2], date of birth July 6, 1993, and son, Ricardo[2], date of birth May 13, 1996 (Docket Entry No. 6, hereinafter

[2] These pseudonyms are being used for the children.

D.E. 6). Prior to this date, the parties had joint legal custody, and equally shared physical custody for approximately seven years. Mother in her Petition for Custody did not request attorney's fees. An Answer was timely filed by Father on December 8, 2003, (D.E. 10).

On April 29, 2004, Mother filed a Motion for Psychological Evaluation (D.E. 19). A Response to the motion was filed on May 7, 2004 (D.E. 20). The Family Court entered an order on May 10, 2004 (D.E. 21) granting the Motion and ordering that the evaluation was to be completed by July 25, 2004, and the written evaluation was to be delivered to Father's counsel by October 1, 2004.

The Family Court entered an Order on June 23, 2004 (D.E. 27), in response to Mother's Motion for Emergency Relief claiming abuse by Father (D.E. 26), scheduling an emergency hearing for July 26, 2004 and a final custody hearing for April 5, 2005. The Court following the hearing of July 26, 2004 entered an order on August 4, 2004 that did not alter physical custody, and scheduled a further hearing for December 2, 2004. The Delaware Division of Family Services concluded that Mother's allegations of physical and psychological abuse were unsubstantiated. In its findings, the Court stated at page 2, "By Oct. 1, 2004, Dr. Romirowsky [Mother's paid expert] shall provide a copy of all the testing to both attorneys. He shall also discuss the findings with both attorneys." (D.E. 33).

In reaction to Father's Motion to Compel, the Court on November 9, 2004 entered a further order that provided in pertinent part, " . . . the testing and notes of Dr. Romirowsky be produced forthwith." (D.E. 36), since Dr. Romirowsky had violated the

original order by failing to produce those documents by the ordered deadline.

A further priority hearing was scheduled for January 5, 2005. The January 5, 2005 hearing was cancelled, based on Mother's counsel's withdrawal of her request for a priority hearing.

As a result of Father's counsel withdrawing from the case, Father filed a pro se motion in February 2005 for continuance (D.E. 41), because he did not have representation at that time, and was seeking counsel.

The Court on March 1, 2005 entered an order denying continuance of the April 5, 2005 trial date requiring Mother's paid expert, Dr. Samuel Romirowsky to "make a copy of his complete file available to Dr. Much [Father's expert], forthwith" (D.E. 43).

New counsel, Norman E. Levine, entered his appearance for Father on March 24, 2005 (D.E. 51), and filed a Motion for Continuance on March 24, 2005 (D.E. 52). The Court denied the Motion for Continuance on March 29, 2005 (D.E. 54).

At the April 5, 2005 hearing, Father's attorney was unable to appear as he was ill. The Court nonetheless proceeded on April 5, 2005 hearing testimony from Ms. Tammy Milligan, a court employee responsible for transcription preparation and coordinator of the listening of recordings of proceedings, as well as from Patricia Dailey-Lewis, Esquire, attorney for the Delaware Division of Family Services. The Court attempted to coerce Father to agree to testimony from Dr. Romirowsky, without his counsel present, creating a confrontational adversarial conflict between the Trial

Judge and Father at T-13 of the April 5, 2005 hearing:

> "THE COURT: . . . Okay, now I have two experts here. I don't mind hearing them. I can leave the record open, let Mr. Levine listen to the recording of them and then we can figure when he comes back and does the cross examination. That may be the best way to proceed today. And that actually gives him more time to prepare the cross than he would if he were here today. Did you understand what I said?
>
> MR. SHUFLER: Were you asking me if that would be okay with me?
>
> COURT: I'm telling you that is what I think you should do, yes, if you have a different response, I'll be happy to hear it.
>
> MR. SHUFLER: I completely have a different response in that my preference would be that since I'm unrepresented today that this be postponed.
>
> THE COURT: No problem. We'll do that but you are going to pay the fees today for two experts who are here, for the time they have spent here so far."

On April 8, 2005, The Court indicated, "I'm not making any change to the schedule today." (T-68). The Court also stated on page 71, "Because the best thing that happened for Ms. Jones' [Mother's Counsel] case was Ms. Milligan's description of her interaction with Father." (T-71). Ms. Milligan had testified on April 5, 2005, when Father's counsel was absent due to illness.

The Court scheduled additional hearings for April 8, 2005 at 2:45 p.m., April 20, 2005 at 3:00 p.m., and April 21, 2005 at 2:00 p.m. based on an oral motion of Mother's counsel on March 31, 2005 during a teleconference, which alleged no new basis for a priority hearing, since Mother's withdrawal of her request for priority hearing and canceling of January 5, 2005 hearing. The order of April 21, 2005 stated, "The court does not believe that there is sufficient time available on the new dates that have been ordered in this disposition and the Court does not have any more time prior to January of 2006." (D.E. 58).

The Court on April 21, 2005 indicated at (T-46), "One is I am reluctant to change his schedule now because I don't think it is fair to do it without having a full hearing on everything. (emphasis supplied) And everyone understands that the calendar won't bring me that until January." At T-83, the Court was engaging in a colloquy with the parents, Ms. Shufler stated, "And I think it is really important we listen to her (Esther). She, you know, she has been so squashed by so much of what is going on . . ." The Court replies, "But I just listened to her , I just changed the schedule."

The Court at T-91, 92 continuing the colloquy had the following interchange with Father,

> "MR. SHUFLER: Well I was just telling my counsel that I personally you know I appreciate what you are doing here and that you are pretty well resolved with what you are doing. I did tell him that I did feel it was a bit unfair for him not to have an opportunity to cross examine Dr. Romirowsky.

THE COURT: That may be true, that may be true sir.

MS. JONES: As long as Your Honor understands I haven't had the opportunity yet to cross examine Mr. Shufler.

THE COURT: Right.

MR. SHUFLER: Well I welcome that.

MR. LEVINE: I haven't finished my direct of Mr. Shufler.

THE COURT: That's right and life is unfair. You know it is unfair that I didn't get a lunch break today and that I have to take public transportation to get to New Jersey this afternoon and I have been here in the afternoon and I don't know what is sitting on my desk and the time is running. There are lots of things that are unfair. I feel that I know the case, and yes, he didn't get to do the cross examination, but I think this is more important. It is quarter of five and it is not fair that I'm keeping a judicial assistant here past 4:30.

I could go on through a much longer list of the unfairs. If you want to, you can talk to your lawyer, you can file the paperwork and ask that it be certified to the Supreme Court and see if the Supreme Court will take it and let the Supreme Court spend between now and January deciding whether the level unfairness and what I have done was such egregious that they want to do something before January. I am perfectly willing if Mr. Levine thinks that under the canons of ethics that it is a viable claim, I am basically willing to look at what he files and you can certify to the Supreme Court. The Supreme Court can know right away how

unfair I am. That is okay with me. I am not being difficult."

The colloquy continues at T-104-105 as follows:

"MR. SHUFLER: Okay. I understand the deposition. But I think it is an important part of my case that we have an opportunity between now and, the date in January to be able to cross examine. I don't know if that is asking too much.

THE COURT: It is asking too much because my calendar doesn't have this, any place to do it . . .

DICTATION/THE COURT: New paragraph, Ms. Jones did not complete the direct examination of Dr. Romirowsky and Mr. Levine did not cross examine him. In contrast, Dr. Much completed his direct and was cross examined. Mr. Levine may cross examine Dr. Romirowsky on anything to which he testified during the April 2005 hearing <u>when the hearing resumes in January of 2006</u>. (emphasis supplied)

THE COURT: Let me tell you something. You got the advantage of that. Because you got your witness to testify on direct and cross and have more weight. He got less time so actually even though you didn't cross examine, you came out ahead on that one. Do you understand what I just said?

MR. SHUFLER: I understand what you just said.

THE COURT: Good. You got full uninterrupted direct and cross of your witness. While that did not happen with Ms. Jones. So

although technically you didn't cross examine, you got a better opportunity to present you case then she did. Yes?"

Dr. Mandell Much, Father's qualified psychological expert testified, the previous day, on April 20, 2005 and March 6, 2006. The Trial Court allowed extensive cross-examination on both occasions, which is in stark contrast to the treatment of Mother's expert.

The Court stated at page 87 of the April 20, 2005 transcript,

> "And the questions that we have now is whether it is in the next three months or six months or the next year or whatever, is dad going to pick up the pieces, will he rise to the occasion without mom plugging the holes for him or will he not be able to rise to the occasion. And the other piece that is the issue for me is that while we find out whether he will rise to the occasion or not, I'm not going to allow the kids to be in a dirty place, a non safe place. So that is what this case is about. (emphasis supplied) I will ultimately make a decision on custody when we have the hearing in January."

On April 26, 2005 following the above-identified hearings, and oral order of April 21, 2005, the Court entered an interim order indicating that it had heard testimony from the parents and the experts, Dr. Romirowsky and Dr. Much; however no cross-examination of Dr. Romirowsky was allowed. Despite making no finding of abuse, a non-safe or dirty place, the Court entered an interim schedule, modifying the shared custody arrangement to a schedule that provided in each two week cycle,

Mother would have the children for 8 overnights, and Father would have the children for 6 overnights (D.E. 60).

On October 3, 2005, the Court entered a decision which provided in pertinent part, "Counsel shall submit questions for the children's interviews by December 1, 2005. The interviews will occur with counsel present . . ." (D.E. 71). There were no parameter or guidelines regarding the number or content of questions to be submitted.

By letter dated November 29, 2005, the Court indicated that if the children were to be interviewed, the proposed questions shall be submitted to the Judge at 9:00 a.m. on January 10, 2006, and the interviews would commence at 9:30 a.m. (D.E. 86). The Court, following a conference on January 6, 2006, entered a scheduling order on January 10, 2006 that provided in pertinent part, "6. Each child shall be interviewed separately on January 10, 2006 immediately following the presentation of written questions for each child to the Court at 9:00 a.m. on January 10, 2006."

On January 20, 2006, the court entered an order following the January 10, 2006 hearing date that provided in pertinent part:

"Counsel shall meet with Dr. Romirowsky by January 25, 2006 and view the software on Dr. Romirowsky's computer regarding paragraphs 3 and 4 of the November 28, 2005 Order" [Psychological tests administered by Dr. Romirowsky.]

On January 23, 2006, Father filed a Motion to Exclude or Delay Dr. Romirowsky's testimony because of his failure to comply with the Court's orders of November 28, 2005 and January 10, 2006 to produce certain documentation (D.E. 102).

On March 1, 2006, the Court entered an order which provided in pertinent part at page 12 denied Father's Motion to Exclude or Delay Dr. Romirowsky's testimony based on paragraphs 1-3 of the Court findings of fact at page 9 which were (1) The Court's order dated January 29, 2006 advised counsel to meet with Dr. Romirowsky on January 25, 2006 to view the software on his computer. [Dr. Romirowsky refused to allow such a meeting.] (2) On or about February 1, 2006 Mother provided all of the relevant information that she had been able to obtain from Dr. Romirowsky. (3) The Court understands that the deposition of Dr. Romirowsky has been taken [The deposition had not and was not taken] (D.E. 133).

The March 1, 2006 order of the Court (D.E. 133) regarding a motion filed by Father, concerning an Interlocutory Appeal, (see page 22 infra) for which Mother was seeking $1,200.00 in attorney's fees, provided that Mother may file an Affidavit for Attorney's Fees by March 7, 2006. Of twenty-eight requests for attorney's fees filed by Mother, this was the only one that the Court even allowed Mother to file an Affidavit for Attorney's Fees. The other twenty-seven requests were denied by the Court. Having missed the deadline to file an Affidavit for Attorney's Fees by March 7, 2006, Mother filed a Motion for Extension of Time to File Affidavit on March 13, 2006 [six days after the Affidavit was due](D.E. 124). The Court on March 20, 2006 denied Mother's motion for extension of time, stating, "the Motion is denied if no other fees are sought. If other fees are sought, a Motion to include these files may be filed. In that event, Father may move to permit

filing for reargument of the March 1, 2006 decision on the question of fees." (D.E. 128)

The Delaware Family Court on April 5, 2006, sua sponte orally considered the possibility of separate overnight visitation for each sibling, stating:

> "Dr. Much has suggested it to father and that is regardless of what schedule I arrive at, I was thinking as I have been ruminating about this case that it might be worthwhile for father to have one on one time with each of the kids. And one question which I am happy to put in writing in a letter to you in the next few days rather than deal with it now, but one question I have is what would be an appropriate mechanism for doing that. Some ideas come to mind for example one possibility would be that when father has his weekend time with the kids he could return one child like father said on Sunday and he can keep the other child overnight and alternate doing that with the kids." (April 5, 2006, T-107). (emphasis supplied)

The Court in its June 1, 2006 custody decision (D.E. 162) based not considering one-on-one overnight custody on the mistaken impression that Father was opposed (page 24) to one-on-one time. After reargument clarifying Father's lack of opposition, the Court in its July 26, 2006 order corrected its mistake and found that Father was neutral to the idea of one-on-one overnight time. Because of its mistaken impression that Father was opposed, the Court was required, after correcting its error, pursuant to Mundy v. Devon, 906 A.2d 750 (Del. 2006), to reconsider all custody options, for

example Sunday overnight one-on-one time on an alternating basis, as the Court had previously indicated it was considering. [emphasis supplied]

Also, the Delaware Family Court failed to consider Dr. Much's, Father's psychological expert, recommendation that Esther be with Mother nine nights and with Father five nights, and that Ricardo be with Mother seven nights and Father seven nights in each two week cycle. The Court failed to consider its above-stated alternative, Dr. Much's recommendation, as well as any other alternative that separated the siblings even one overnight. The Court failed to consider Ricardo's wishes, and acceded to Esther's wishes, demonstrating a bias favoring Esther's wishes, and marginalizing Ricardo's wishes, resulting in Petitioner's rights again being denied.

Mother filed a Motion for Attorney's Fees on September 1, 2006 (D.E. 203). Father filed a Motion to Dismiss on September 12, 2006 (D.E. 205). The Court denied Father's Motion to Dismiss on September 21, 2006 (D.E. 207). Father filed a Response to the Motion for Attorney's Fees on October 6, 2006 (D.E. 210), noting that Mother had not requested attorney's fees in the Petition for Custody that she filed, that no attorney's fees were ever awarded in response to numerous requests in pleadings filed by Mother responding to motions, etc. The one time the Court indicated it would consider a request for attorney's fees in connection with a motion, Mother failed to meet the dead-line set by the Court for filing an affidavit for attorney's fees. The Court entered its order awarding $36,000.00 attorney's fees on November 2, 2006 (D.E. 211). Father filed a Motion for Reargument on November

13, 2006 (D.E. 212), which the Court denied on December 4, 2006 (D.E. 215).

ARGUMENT

The Delaware Family Court and Delaware Supreme Court erred in concluding that Petitioner's rights under the United States Constitution, Amendment XIV were not violated. He was denied due process of law and equal protection of the law when the Family Court did not allow Petitioner to fairly and fully present his case.

I. Legal Authority

To maintain the integrity of the judicial system, the Court must be concerned whether the parties received fair and impartial treatment of their claims. At the risk of under-mining the public's confidence in the judicial process, the welfare of the parties and the best interest of the children must receive priority over other considerations. In the matter presently under review, justice requires that the lower Court's decision be vacated and the issues placed before a new Judge. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." Liljeberg v. Health Services Requisition Corp-oration, 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed.2d.855 (1988) at page 870 quoting Public Utilities Commission of D.C. v. Pollack, 343 U.S. 451, 466-467, 72 S. Ct. 813, 822-823, 96 L. Ed. 1068 1068 (1952).

Article XIV, United States Constitution in pertinent part provides:

"No person shall be deprived of life, liberty, or property, without due process of law."

Article XIV, Section 1, United States Constitution in pertinent part provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is generally agreed that a litigant is entitled to have his case decided by a Judge who can approach the facts in a detached and objective manner; indeed, the protection of the integrity and dignity of the judicial process from judicial bias has been hailed as the palladium of our judicial system.

Petitioner invokes the Fifth Amendment protection because of its applicability to federal jurisdiction. Due process under the Fifth Amendment, along with the other guarantees of the Bill of Rights, when applied by federal courts, does serve as the basic protection of the citizen against unjust federal action. Crain v. United States, 162 U.S. 625 (1896), 16 S.Ct. 952, 40 L.Ed. 1097 . . . In such case, there is neither an intervening state of court system nor an intervening state constitution. It is therefore, the Court's view that Fifth Amendment due process must be given an even broader connotation than Fourteenth Amendment due process. *Unites States v. Townsend*, 151 F.Supp. 378 (D.C.D.C. 1957), at 387.

Due process . . . [requires] that a judge who is otherwise qualified to preside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. **No person should be required to stand trial before**

a judge with a 'bent of mind.' *Collins v. Dixie Transport, Inc.*, 543 So.2d 160 (1989), at 166 citing *Berger v. United States*, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed 481 (1921); Wolfram, *Modern Legal Ethics* § 17.5.5 Independence and Neutrality, p. 989 (1986). (Bold emphasis supplied).

Adjudicative decisions . . . should be free of bias or prejudice. Thus an adjudicative decision maker should be disqualified if he or she has prejudged disputed adjudicative issues. *"Valley et al. v. Rapides Parish School Board*, 118 F.3d 1047 (5th Cir. 1997), at 1053. Moreover, "Prejudgment as to the facts . . . or reason to believe such exists, if fairly supported, would, in the Court's view, satisfy Section 144." *Bradley v. School Board of City of Richmond, Virginia*, 324 F.Supp 439 (E.D. Va. 1971), at 445.

The basic requirement of constitutional due process is a fair and impartial tribunal, and the Supreme Court has consistently enforced this basic procedural right.

The problem of a procedural defect arises when decision makers have prejudged the facts to such an extent that their minds are 'irrevocably closed' before actual adjudication. *Valley*, at 1052 citing *Baran v. Port of Beaumont Navigation District of Jefferson County*, 57 F.3d, 436 (5th Cir. 1995), at 446.

Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on its part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. **If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial.** Section 144, Title 28, U.S. Code. *Knapp v. Kinsley*, 232 F.2d 458, (6th Cir.

1956), at 465. Rehearing denied 235 F.2d 129, cert. denied 352 U.S. 892, 77 S. Ct. 131, 1 L.Ed.2d 86. (Bold Emphasis supplied).

A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' requiring recusal because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment. (That explains what some courts have called the 'persuasive bias exception' to the extra judicial source doctrine. See e.g. *David v. Board of School Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (CA5 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).) *Liteky v. U.S.*, 510 U.S. 540, 551, 114 S.Ct. 1147, 127 L.Ed.2d 474(1994).

Because we seek to protect the public's confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, **but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias.** *United States v. Antar*, 53 F.3d 568 (3rd Cir. 1995) at 574; *United States v. Bertoli*, 40 F.3d 1384, 1412 (3rd Cir. 1994); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) at 162; *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992). *In re Antar*, 71 F.3d 97 (3rd Cir. 1995), at 101. (Bold emphasis supplied).

The United States Supreme Court has made it clear that "a fair trial in a fair tribunal is a basic requirement of due process", in administrative adjudicatory proceedings as well as in courts. *Michigan Dept. of Soc. Servs. v. Shalala*, 859 F.Supp. 1113, 1123 (W.D. Mich. 1994)(quoting *Withrow v. Larkin*, 421 U.S. 35, 36, 95 S.Ct. 1456, 1459, 43

L.Ed.2d 712 (1975)). Thus, as stated by Justice Kennedy in his concurring opinion in the most recent Supreme Court case construing the analogous federal statute on judicial disqualification, "if through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source." *Liteky v. U.S.*, 510 U.S. 540, 563, 114 S. Ct. 1147, 1161, 127 L.Ed.2d 474 (1994)(Kennedy, J., concurring). This is because, as our court of appeals has declared, '**litigants ought not have to face a judge where there is a reasonable question of impartiality . . .**' *Alexander v. Primerica Holdings, Inc.*, 10 F. 3rd. 155, 162 (3d Cir. 1993). *D.B. v. Ocean Tp. Bd. Of Educ.*, 985 F.Supp 457 (D.N.J. 1997), at 540. (Bold emphasis supplied).

Furthermore, no judge should have ultimate authority over what constitutes his or her own conflict of interest.

No longer is a judge's introspective estimate of his own ability impartially to hear a case the determinate of disqualification under § 455. The standard now is objective. It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge. *Roberts v. Bailar*, 625 F.2d 125, (6th Cir. 1980), at 129. On remand, 538 F. Supp. 424 (References deleted, bold emphasis supplied).

The sentiments expressed in Roberts v. Bailar, Id. are generally reinforced in Liteky v. U.S., 510 U.S. 540 (1994).

In *Cohens v. Virginia*, Chief Justice Marshall famously cautioned:

> "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404 (1821).

Among longstanding limitations on federal jurisdictions otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history. See, *e.g.*, Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L. J. 571, 584-588 (1984); *Spindel v. Spindel*, 283 F.Supp. 797, 802 (E.D. NY 1968) (collecting cases and commentary revealing vulnerability of historical explanation for domestic relations exception); Winkler, the Probate Jurisdiction of the Federal Courts, 14 Probate L. J. 77, 125-126 and n. 256 (1997) (describing historical explanation for probate exception as "an exercise in mythography"). Marshall v. Marshall, 547 U.S. 293 (2006), 2006 U.S. Lexis 3456.

II. The following are eight examples of the Family Court's denial of Petitioner's rights to due process and equal protection of the law. Examples 1-5 are presented in chronological order. Examples 6-7 are presented in chronological order of the Trial Court's decisions. Example 8 is presented last since it focuses on the Court's failure from the hearing on April 8, 2005 to the Court's decision on December 4, 2006, to treat the litigants equally as required

pursuant to Amendment XIV of the U.S. Constitution.

1. The Family Court denied Father's constitutionally guaranteed rights when it heard testimony on April 5, 2005 when Father's counsel was not present because of illness, and put undue pressure upon Father to proceed with the hearing without his counsel present. On April 5, 2005 Father's counsel was ill and the Family Court Judge called his office to confirm. The Court attempted to coerce Father to agree to Mother's expert testifying without Father's counsel present. The Court had already heard testimony from Ms. Milligan, a Family Court records employee, and Patricia Dailey-Lewis, Esquire, attorney for the Delaware Division of Family Services. The Court on April 8, 2005 stated, "Because the best thing that happened for Ms. Jones' [Mother's attorney] case was Ms. Milligan's description of her interaction with Father." The denial of Father's rights and the bias expressed by the Court in relying upon Ms. Milligan's testimony without Father's counsel present was irreversible and was a major factor in the Court's Interim Order of April 26, 2005. It was a denial of Father's rights and resulted in Father's time with the children being reduced on an interim basis in April, 2005 from 7 days to 6 days in a 14 day cycle. Several months after the interim order was entered Ms. Milligan's and Ms. Dailey-Lewis' testimony was stricken, but the April 2005 interim order was not, and the schedule remained in place until the Court's June 1, 2006 decision.

In contrast to the Court's undue pressure to persuade Father to have the April 5, 2005 hearing

proceed without his counsel present, Ms. Jones, Mother's counsel, indicated during a pretrial recorded judicial conference on April 27, 2006 that she had accepted employment with Father's former attorney effective May 1, 2006, and that she agreed that she could no longer represent Mother as of the effective date of her affiliation with Father's former counsel as it was an obvious conflict of interest, and which the Court ordered. However, on April 28, 2006, Ms. Jones appeared in the morning at an interim visitation hearing representing Father's former counsel's client. She then appeared in this case in the afternoon of April 28, 2006 representing Mother.

The Family Court judge, when these facts were presented, indicated that, . . . "I am not getting involved." and that Father should seek some kind of arbitration, mediation or disciplinary counsel forum for relief.

These contrary positions taken by the trial Judge with respect to Father's counsel in paragraph 1 above, and Mother's counsel in paragraph 2 above, demonstrate the Court's bias against Father, and in favor of Mother, and denied Father's equal protection rights.

2. The Court's orders regarding priority hearings were so inconsistent and biased as to deny Father equal protection and due process.

The Court granted Mother's motion for a priority hearing, based upon Mother's numerous allegations of abuse by Father which were found to be unsubstantiated by the Delaware Division of Family Services in its findings following its investigation. After priority hearings on July 26,

2004 and December 2, 2004, the Court declined to alter the parties' custody schedule of seven days with each parent in each two week cycle, because of the absence of abuse.

The Court scheduled another hearing for January 5, 2005, which was cancelled because Mother withdrew her request for a priority hearing.

During a teleconference on March 31, 2005, Mother's counsel then again asked for a priority hearing, without offering any basis for the scheduling of a priority hearing. The Court then scheduled a series of priority hearings for April 8, 2005 at 2:45 p.m., April 20, 2005 at 3:00 p.m. and April 21, 2005 at 2:00 p.m. This order violated Family Court Civil Rule 65.2(c) which states,

> "(c) *Priority scheduling request*. Applications for early scheduling of a hearing shall be made by motion and may be considered by the Court, in chambers, and without the participation of the parties, or their counsel, after service of process has been accomplished, notice of the motion given, and the time for response to the motion has expired. The motion shall be considered on affidavits and verified pleadings, which must set forth: (1) the nature of controversy; (2) the relief sought at a priority hearing; and (3) the facts upon which the Court may conclude that unless the priority scheduling request is granted, substantial and irreparable harm will result."

Also violative of the above-cited rule was the Court's modification of the visitation schedule by order dated April 26, 2005 (D.E. 60), which reduced Father's time from seven overnights to six overnights in each fourteen day cycle.

3. Dr. Samuel Romirowsky (Mother's paid expert)

Mother filed a Motion for Psychological Evaluation on April 29, 2004 (D.E. 19). Father's Answer indicated that neither Father nor Father's counsel had ever approved any evaluation and was opposed to the evaluation (D.E. 20). The Court entered an order allowing psychological evaluation on May 10, 2004 (D.E. 21). Father filed a Motion for Reargument as Dr. Romirowsky had begun his family psychological evaluation before the original motion was made by Mother (D.E. 19) and the Court order was entered (D.E. 22). Mother filed a response, attaching a series of e-mail between Mother and Mother's counsel. The April 14, 2004 e-mail from Mother to Mother's counsel, Ms. Jones, stated, "I am supposed to see Dr. Romirowsky this Friday for our second visit. I have gotten the bill from his office and am wondering if I should pay it, in case we have to file the motion and it is denied . . .", [emphasis supplied] and Mother sent another e-mail to Ms. Jones dated April 26, 2004, stating,

> "I have another appointment with Romirowsky this Friday and then one with the kids next week, What is the deal with [Jamal]? Will he consent to go or do you need to file a motion to force it?"

Finally, Ms. Jones sends an e-mail to Mother, ". . . I have already told Berkowitz [Father's previous counsel] that I feel I must do a motion to compel him to participate to cover all of us including Romirowsky. I left Romirowsky a vm message that I was gonna do this and if he felt he should stop momentarily, that was ok with me." [emphasis

supplied] (D.E. 23). The Court denied the Motion for Reargument on June 7, 2004 (D.E. 24). The Court's action in allowing Dr. Romirowsky to continue his evaluation was a violation of well settled Delaware law. Patrick J.D. v. Barbara K.K.; Barbara K.K. v. Patrick J.D., 1991 WL539856, (Del Fam) and Chandler v. Chandler, Del Fam No. CN89-10280, Crompton, J. (May 14, 1994) and a violation of Petitioner's due process rights.

Additionally, Dr. Romirowsky, acting as Mother's paid expert, violated the order on numerous occasions, as outlined above, to provide test results, written evaluations, etc., to Father, and Father's attorney by October 1, 2004 without sanctions from the Court, even though Dr. Romirowsky orally agreed on July 26, 2004 to provide the written evaluation. Nothing was ever provided by Dr. Romirowsky until after a motion to compel was filed which caused the release of information.

Dr. Romirowsky's testimony on March 1, 2006 at T-48, 75 is indicative of personal bias by Dr. Romirowsky against Petitioner. At T-48, Dr. Romirowsky stated, "I find his behavior to be offensive much of the time." And "I think my own subjective experience has been valuable data . . ." (emphasis supplied). Also at T-75, Dr. Romirowsky demonstrated his bias when he stated,

> "Truthfully you know and I'm not trying to be a wise guy but you know Mr. Shufler could have turned Mahatma Ghandi into a killer. He's extreme. He evokes rage in most people that he interacts with. It was my experience he evoked responses in people that have nothing to do with the custody evaluation. He evokes that reaction in his children." (emphasis supplied).

Similarly Dr. Romirowsky's testimony on April 21, 2005 evidenced personal bias against Petitioner. Dr. Romirowsky testified that Petitioner's prognosis in future counseling was "terrible" at T44-45. Dr. Romirowsky's testimony on April 21, 2005, which was not subject to cross-examination, was the primary reason the Court reduced Father's time with the children in its interim order of April 26, 2005 (D.E. 60).

Dr. Romirowsky personal bias against Petitioner, in violating orders to provide evaluations and testing data, in addition to his multiple violations of well settled Delaware law, as cited above, require a finding of denial of equal protection by the Delaware Courts against Petitioner by allowing Dr. Romirowsky to testify against him. In juxtaposition, Father's expert delivered all testing and evaluations on a timely basis.

On March 1, 2006, the following occurred in Court regarding Dr. Romirowsky's statement at T-7, 8,

> "JUDITH JONES: Yes, Your Honor. I'd like to call Dr. Samuel Romirowsky please.
>
> MR. LEVINE: Your Honor, before Dr. Romirowsky begins I think we need to talk about the order in which he is going to be examined as Your Honor may recall back April at the last hearing Dr. Romirowsky testified at the April hearing but I did not have an opportunity to cross examine due to time restraints. And, Your Honor, indicated that I could cross examine that when we resumed this hearing I would be able to cross examine on those issues that were testified to in April, and I would like to be able to do that prior to the direct of Ms. Jones and of Dr. Romirowsky.

JUDITH JONES: Well, Your Honor, if I could add if you also recall the last time Dr. Romirowsky was there . . .

THE COURT: I'm not doing a cross and then a direct and then a cross. We'll do a direct and then we'll cross him on everything.

JUDITH JONES: I did not finish my direct at the April hearing of Dr. Romirowsky.

THE COURT: We're doing a direct and then we're doing a cross because I'm also hearing Dr. Much today and I don't want to be unfair to him. Okay."

The Court violated its prior order which stated that Dr. Romirowsky testimony's would begin with cross-examination. (See page 8, infra) The reversal of the Court's prior order in the courtroom on March 1, 2006 is another example of the Court's bias against Father, and disadvantaged Father's counsel since he was forced to combine cross-examination of Dr. Romirowsky's April 21, 2005 and March 1, 2006 testimony into one cohesive cross-examination. In contrast Father's expert, Dr. Much was cross-examined immediately following his direct examination on both occasions when he testified.

4. The children's interview process

The Court on October 3, 2005 entered an order which provided in pertinent part, "Counsel shall submit questions for the children's interviews by December 1, 2005. The interviews will occur with counsel present . . ." (D.E. 71). The Court on November 9, 2005 entered an order that provided that counsel were not to identify the questions submitted by opposing counsel to their client, canceling the December 30, 2005 interviews, and

rescheduling the interviews for January 10, 2006 (D.E. 79). The Court by letter dated November 29, 2005 indicated that the questions were to be submitted to the Court at 9:00 a.m., and the interviews were to commence at 9:30 a.m. on January 10, 2006 (D.E. 86). The Court followed up with a scheduling order, following a conference on January 6, 2006, that each child would be interviewed separately, immediately following the presentation of written questions to the Court at 9:00 a.m. on January 10, 2006 (D.E. 100). Without any prior knowledge to counsel and parties, on January 10, 2006 at 9:00 a.m. the Court proceeded to interview first Esther (T-1), and then Ricardo (T-10), without having offered counsel the opportunity to present questions, and without counsel present, violating Petitioner's right to due process.

The Court when made aware of its failure to follow the procedures it had previously ordered, and which counsel and the parties had relied upon, had the children returned to the Court after they had been dismissed, left the building, and interacted with Mother and Mother's friend (T-16). The Court re-interviewed Esther with counsel present, asked only the first 20 questions of Father's questions, none of Mother's questions, and none of Father's or Mother's questions to Ricardo (T-26). The Court indicated that, "I am willing to let you prepare the paperwork to certify the questions for the Delaware Supreme Court if you want to."(T-27), indicating that the Court realized the gravity of its prejudicial error. The Court then began a process where first just the attorneys listen to the recordings of the children's interviews (T-27). The Court then had the parents listen to the recording of the children (T-50). The

Court after allowing limited time, which was much less time then Father requested for preparation of questions, limited to cross-examination based on only the Court's questions (T-55), allowed the attorneys to cross-examine the children in the courtroom (T-59). The Court in not following its own orders as to how the children's interviews would proceed, and then taking remedial actions of asking Esther only the first twenty of Father's questions and none of Mother's questions, and completely excluding Ricardo from being asked questions from the parents, then making the attorneys cross-examine the children based on the questions previously asked, so tainted the process, that Petitioner was denied due process of law. In summary, the Court committed a series of errors in not following its own orders and adopting convoluted remedial actions, depriving counsel and parties of time to adequately prepare for the changing procedures, as they was being changed and switched in real time, resulting in evidence that was unreliable, placing undue emphasis on Esther's responses and exhibiting bias toward Esther's position and against Ricardo's position, and denying Petitioner due process of law. The children were in the courthouse for roughly seven hours and the extreme waste of judicial resources and everyone's time was a direct result of the trial court's failure to follow its own order and then attempting to remedy its error.

5. The Court's treatment of the presentation of evidence by collateral witness, Katherine Herzog, on behalf of Mother, is strong evidence of the Court's bias against Father and denial of Father's rights.

The Court on January 10, 2006 entered an order that provided in pertinent part,

> "12. Ms. Jones shall identify by 1/15/06 whether Ms. Herzog will testify on 3/6/06 at 2 P.M. If the hearing has ended prior to that date, the court will address the matter on 2/3/06. The parties will share the expense of a round trip direct flight ticket, purchased by 1/15/06, and two nights at the Spencer Hotel and 2.5 days per diem at the rate of $30/day. For now, the court rejects the option, proposed by Ms. Jones, of a telephone deposition." (D.E. 100).

The Court in its letter order of January 25, 2006 (D.E. 103) ordered that, "The parents shall testify on 2/3/06.". (emphasis supplied)

Despite the above, Mother, in violation of the Court's order, failed to comply by January 15, 2006. However, on January 31, 2006 Mother filed a motion to allow Ms. Herzog to testify on February 3, 2006, three days after the filing of the motion (D.E. 107), expediting her testimony by 33 days over Father's objection. The Court permitted Ms. Herzog to testify on February 3, 2006, even though Father's attorney prepared not for Ms. Herzog, but to cross-examine Mother pursuant to the Court's scheduling order. The Court attempted to cure this prejudicial error, by allowing Father to take Ms. Herzog's deposition in Court immediately preceding her testimony, an inadequate remedy, because Mother had prepared for Ms. Herzog and Father had not. Father was denied timely discovery, and therefore deprived of his right to a fair trial as counsel was not given adequate or reasonable time for preparation with respect to Ms. Herzog's deposition and trial

testimony. Father's right to pretrial discovery was eviscerated.

The Trial Court in its June 1, 2006 decision used three of the twenty-five pages to discuss the testimony of Ms. Herzog, even though the Court recognized at page 16 of its June 1, 2006 order that there were only fifteen to twenty-five seconds of non-verbal interaction between Father and Ms. Herzog. The Court's magnification of this fifteen to twenty-five second interaction demonstrates the weakness of the rationale of the Court's decision, which can only be explained by bias against father.

6. The Delaware Family Court in its decision on reargument on July 26, 2006 failed to reconsider all options as required by the Delaware Supreme Court in Mundy v. Devon, 906 A.2d 750 (Del. 2006).

The Trial Court in its June 1, 2006 decision based not awarding one-on-one overnight time on the mistaken impression that Father was opposed (page 24) to one-on-one overnight time. The Court in its July 26, 2006 order corrected its mistake and found that Father was neutral to the idea of one-on-one time. Having admitted its error, the Court was required, after correcting its mistaken impression, pursuant to Mundy v. Devon, 906 A.2d 750 (Del. 2006), to reconsider all alternative placement arrangements, for example Sunday overnight one-on-one time on an alternating basis, as the Court had previously orally indicated it was considering, or the nine-five schedule Dr. Much suggested for Esther and seven-seven for Ricardo. The Court ruled out any other variations of one-on-one overnight time.

The Trial Court at footnote 17, page 10 of its June 1, 2006 decision states, "Consistent with *Mundy v. Devon*, No. 174, 2006 Del. LEXIS 162, at *14 (Del. April 6, 2006), the court considered all placement options."

The Delaware Family Court failed to reconsider its decision based on the correction of Father's position noted above, and specifically did not correct its decision of June 1, 2006 at page 24 where the Court stated, ". . . the court considered the possibility of having each of the children spend time alone with Father on a regular basis. However, both parents opposed this." The Court continued, "The court will not force the issue of Father and Esther having some structured one-on-one time since Father apparently believes that he has sufficient opportunities for it under a schedule that gives him both children at the same time." (emphasis supplied). The statement inaccurately speculates as to Father's position and failed to consider the diminution of opportunities created by the reduction of time with both children that the Court ordered in its June 1, 2006 decision (D.E. 162). Instead the Court blamed Father for the Court's own error (See footnote 11 to the Trial Court's decision of July 26, 2006 at page 5 (D.E. 185), where the court stated,

> "The Court finds it noteworthy that, while Father is apparently neutral to the idea of alone time with the children, in the motion at issue, he, in effect, requests the Court to do away with any alone time either parents currently has with the children by requesting that he have both children Thursday nights instead of just Ryan on alternating Thursdays. This kind of inconsistency is found throughout Father's

motion and makes it difficult for the Court to determine Father's overall position on several issues."

The Court also misinterpreted Father's position where it states at lines 3-4 of the above-quote that Father's, "request to the Court to do away with any alone time." Father never made such a request. This quote is an excellent example of the Court's biased speculations and findings.

The Delaware Supreme Court concluded in Mundy at pages 10-11,

> "Since the mother did not file a petition for primary placement, we directed the parties to file supplemental memoranda addressing the residential placement options that were available for consideration by the Family Court. In those supplemental memoranda, both parties agree that the Family Court should have considered all residential placement options and then decided which arrangement was in Casey's best interest.
>
> The record reflects that the parties did not make it clear to the Family Court that they agreed *all* options for residential placement were before it for consideration. It also is unclear whether the Family Court *did* consider all options. Therefore, this matter will be remanded to the Family Court to: i) report whether it did consider all options; and ii) if it did not, to do so and report its conclusion as to what residential placement arrangement is in Casey's best interests."

Further, the Delaware Family Court failed to consider Dr. Much's, Father's psychological expert, recommendation that Esther be with Mother nine

nights and with Father five nights, and that Ricardo be with Mother seven nights and Father seven nights in each two week cycle, and failed to consider Ricardo's wishes, and acceded to Esther's wishes, demonstrating a bias favoring Esther's wishes, and marginalizing Ricardo's wishes, resulting in Petitioner's rights again being denied. The trial court on July 26, 2006 also failed to explain its failure to reconsider options in light of Mundy, which the trial court stated in relied upon in its June 1, 2006 decision (D.E. 162).

7. The Trial Court's failure to explain in arithmetic or other terms the basis for its award of attorney's fees, and its failure to follow 13 Del. C. § 731 violated Father's right to equal protection and due process.

7 Del. C. § 731 provides,

> "The Court from time to time, after considering the legal and factual basis for the action, the results obtained, the financial resources of the parties, and such other factors as the Court deems just and equitable, may order a party to pay all or part of the costs to another party of maintaining or defending any proceedings under this chapter and for attorney's fees, including sums of legal services rendered and costs incurred prior to the commencement of such proceedings. The Court may order that the amount be paid directly to the attorney who may enforce the order in his or her name." (emphasis supplied)

It requires the Court to consider, "the financial resources of the parties", 13 Del. C. § 731. Mother filed a Motion for Award of Attorney's Fees on

September 1, 2006 (D.E. 203). Father filed a Motion to Dismiss on September 12, 2006 (D.E. 205), which provided in pertinent part that Mother had not provided information concerning her financial resources, citing Husband B.W.D. v. Wife B.A.D. 405 A.2d 123 (Del 1979). The Court denied the motion by order dated September 21, 2006 (D.E. 207). Mother filed a Supplemental Affidavit dated October 4, 2006, that provided income and expense information, but no information of financial resources. Curiously, Mother attached a letter to the sworn affidavit to the Court, that falsely overstated a specific account of Father's by nearly $400,000. This continued her pattern of deceit and perjury, discussed in example eight infra. Father filed a timely Response to the Motion for Award of Attorney's Fees on October 6, 2006 (D.E. 210). Mother's motion and Father's response were based upon particularity of exact hours and fees. The Court entered on order on November 2, 2006 awarding $36,000 in attorney's fees (D.E. 211). Father filed a Motion for Reargument on November 13, 2006, (D.E. 212), asking for an explanation of the equation of calculation – i.e. explaining the 136 "wasted" hours of counsel time, which the Court denied on December 4, 2006 (D.E. 213). The Court based its award on Father being overly litigious. Despite being contested by Father, that conclusion was not substantiated by the Court. The denial of twenty-seven of twenty-eight requests for attorney's fees proves that Father was not found to be overly litigious by the Court.

The substantial award should be reversed because of Mother's failure to comply with 13 Del. C. § 731, and the Court's failure to require compliance.

The award was arbitrary and capricious and completely lacked the support of any arithmetic calculations showing the particulars of the Court's calculation, if any.

The Delaware Family Court also failed to state a basis for its calculation resulting in the $36,000 attorney's fee award, which equals 90% of the attorney's fees Mother requested and equals approximately 136 hours of attorney's time. The Family Court failed to provide any computation of hours regarding bad faith or unreasonably litigious issues. In its decision on reargument, which had requested a computation, the Family Court denied the Motion for Reargument stating at page 2 of its December 4, 2006 Order, . . . "said matters can be presented to a higher court it they are germane," blatantly refusing to explain the arithmetical basis for its calculation, rendering its decision arbitrary and capricious, contrary to Delaware statute, and violative of Father's due process rights. The award was indefensible as it lacked an explanation of its rationale. The Delaware Supreme Court in its decisions did not explain the basis of its affirmance of this or any other issue.

8. The Court did not properly address Mother's lack of veracity, inappropriate behavior, and violations of Court orders.

The purpose of this example is not to impugn Mother's integrity, but to address the Court's reactions and rulings regarding Mother's perjury and lying.

The Court indicated, "Mother's credibility was severely impaired during this litigation. Father successfully proved that she lied under oath." June

1, 2006 decision, page 4 (D.E. 162). However the Court cited only one instance of Mother lying under oath, and after finding Mother's credibility "severely impaired" took diminis action based on Mother's perjury, nor did the Court disregard Mother testimony. However the same judge in Kemp v. McGinnis, 1997 WL878442 (Del. Fam. Ct.) found that Mother's perjury was a significant factor under 13 Del. C. § 722, (a)(6), the Delaware "Best Interest Standard" for custody, stating at page 3, "Past and Present Compliance. This factor favors neither parent. It would have favored Mother if she had not engaged in perjury and obtained a PFA with false testimony." (emphasis supplied)

Mother also perjured herself regarding six other issues: (1) the fire at her residence (March 7, 2006, T-44), (April 8, 2005 T-37), (2) Father making the kids walk to Enterprise Rent-A-Car more than once (April 8, 2005 T-19), (3) Father hadn't worked in two years as of April 8, 2005 (T-24), (4) Mother has not been treated for mental illness, and only took Celexa for 1 or 2, or 4 years (April 8, 2005, T-35, March 6, 2006, T-63), (5) That hairdresser told her that Father abused Esther regarding the haircut incident, and that the hairdresser lied under oath (T-35-36), (6) Ricardo throwing up at school on March 3, 2006 (T-6). Additionally, Mother admitted to taking the children to Dr. Romirowsky before the Court order (April 8, 2005, T-48-50), and lied by omission in failing to reveal to the Division of Family Services that the photographs shown to Ms. Lydia Jones of the Division of Family Services were five years old (T-58, 59).

The Court in addressing 13 Del. C § 722 (a)(6) "Past and present compliance by both parents with

their rights and responsibilities to their child under § 701 of this title", found Mother's testimony about the "maggot in the lunchbox", and regarding the conditions of Father's home not credible (pages 21-22 of June 1, 2006 decision (D.E. 162)). The Court omitted Mother's numerous denials of Father's overnight visitation, and concluded, contrary to the weight of the evidence, that this factor favors Mother. The Court also did not address the incidents of Mother neglectfully leaving Ricardo home alone with a 102° temperature, about which there was significant testimony.

The Court after finding that Mother's credibility was severely impaired recited and gave weight to her testimony at pages 6, 9, 11, 21 of the decision of June 1, 2006 (D.E. 162), contrary to the maxim falsus in partus, falsus in omnius. Mother's testimony evidenced such persistent and obvious perjury, that the Court as a matter of law should have given no weight to her testimony, and doing so violated Petitioner's due process rights.

The Court on April 5, 2006 at transcript pages 84-85, stated

> "THE COURT: Mr. Levine, you do understand that since I went through the process of making the decision about the holiday schedule I am not as hung up as Mr. [Shufler] is as to whether mother has issued falsehoods or she had, because I understand that when people come before me they do things that are inconsistent. And I have not at any point in this proceeding over all the months thought that mother was correct in everything that she said and, in fact, I have given ruling after ruling that has not been what mother

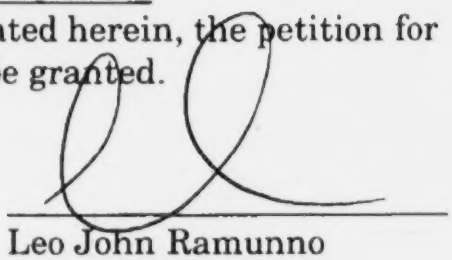
wanted. I, I don't view this a European process in which the goal of this proceeding is to get to the bottom of the truth and we have to go through page after page of examples to impeach one's creditability. That's not what's as the causes. We're not dealing with the case thankfully where someone was sexually abused and I have to make the decision regarding who I believe the abuser or alleged victim or the alleged abuser."

The Court as fact finder evidenced bias against Father and denied Father his rights to due process and equal protection of law by stating its indifference to seeking a truth and Mother's lying and perjury as stated above.

In summary, the Court's conduct, both procedurally and substantively demonstrated a pattern of bias toward Father and in favor of Mother, including undue coercion of Father when his attorney was not present because of illness, failure to follow the Delaware Supreme Court's decision in Mundy, supra which the Court cited in its June 1, 2006 decision but disregarded and failed to follow in its July 26, 2006 decision on reargument, failure to afford Father due process of law regarding the testimony of Dr. Romirowsky, Ms. Herzog, and the children's interviews, and failure to afford Father equal protection and follow 13 Del. C. § 731, and Delaware Family Court Civil Rule 65.2 as cited above. All of the above cumulatively prove the denial of due process and equal protection by the Delaware Trial Court and affirmed by the Delaware Supreme Court

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.



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Oct. 29, 2007

APPENDIX

The Family Court of the State of Delaware
In and For New Castle County
Civil Disposition – Judge

Petitioner	Attorney
Judy Shufler[1]	Michael W. Arrington, Esq.
Respondent	Attorney
Jamal Shufler	Norman E. Levine, Esq.

Before The **Honorable Aida Waserstein**, Judge of The Family Court of the State of Delaware:

File No.	CN01-11049
Petition Nos.	03-33321 05-33995 05-19112 05-20431 06-04112
Nature of Proceeding	Custody (3) RTSC (2)
Date of Teleconference	06/10/05
Date of Hearings	07/26/04 12/02/04 04/05/05 04/20/05 04/21/05 01/10/06

[1] To help protect the parties' privacy at this stage of the proceedings and pursuant to Supreme Court Rule 7(d), this court uses the same pseudonyms as were used by the Delaware Supreme Court in its April 13, 2006 decision refusing an interlocutory appeal in this case.

	02/03/06 03/01/06 03/06/06 03/07/06 04/05/06 04/28/06
Date of Decision	06/01/06

Before the court are Jamal Shufler (Father) and Judy Shufler (Mother) on Mother's Custody Petition. In addition to testimony from the parties, the court heard testimony from Lydia Jones, the Division of Family Services (hereinafter DFS) investigative worker assigned to the case; Stephanie Rocowitz, Emily's former teacher and advisor; Kathy Herzog, a Sanford school parent who interacted with the family at homecoming in 2005; Lisa Kuntz, a notary who notarized Mother's signature in a pleading; the parties' children, Emily born July 6, 1993 and Ryan born May 13, 1996; and three experts: Doctors Samuel Romirowsky, Mandel Much and Leland Orlov.

The court also permitted offers of proof from both parties and admitted into evidence the depositions of Laura Catan, Adrienne Marucci and part of Father's direct testimony. Father's deposition was scheduled to facilitate the conclusion of the case since it had been in litigation for over two years and, absent the deposition, the trial would not have been concluded in a timely manner.

Father made an offer of proof that his former attorney, Gerald Z. Berkowitz, Esquire,

would have testified that he did not authorize Dr. Romirowsky to interview the parties' children prior to the court's order dated May 10, 2004. Mother made an offer of proof that Tammy Milligan, a state court employee, would have testified about her interactions with Father regarding correcting alleged transcription errors in this case[2]. As explained on the record, the court did not consider either of these offers of proof in resolving the custody dispute. To the extent that Father's offer of proof involves a dispute between Father and Dr. Romirowsky, it is more appropriate for said dispute to be decided in another forum.

In regards to the two third-party depositions that the court admitted into evidence, Ms. Catan is the owner of a hairdressing shop where the parties' child, Emily, has had her hair cut for the last five to seven years. Ms. Marucci is the hairdresser who cut the child's hair on May 22, 2005. That haircut was the subject of a dispute between the parties because Father requested that the child's hair be cut shorter than what the child apparently wanted.

Father alleges that, unbeknownst to him, Mother and Emily had previously agreed that the child could grow a pony tail. He stated that Emily did not tell him about her desire to have a pony tail and that he thought that cutting her hair shorter for the summer would be appropriate. Father, however, did not

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[2] Separate dispositions have been entered on the question of transcription errors and the number of questions asked during the children's interviews with the court.

indicate in his testimony that he spoke to Emily ahead of time regarding the length of her hair. In light of the other testimony noted below regarding Father's insensitivity, the court finds it significant that he did not include the parties' twelve year old child in the decision-making process on a matter that involves her personal appearance.

Mother testified that she believes that it was detrimental to Emily for her hair to be cut shorter because one of her ears was previously surgically reconstructed[3]. There is a dispute between the parents on the question of whether the child was inconsolable on the day of the haircut. At line 9 on page 8 of her deposition, Ms. Marucci denied that the child was crying so hard that no one could stop her tears.

BACKGROUND

The parties have a strong history of being able to engage in successful co-parenting. Emily's birth defect, for example, required a great deal of collaborative work by the parties who literally went across the country for appropriate intervention. According to Dr. Much, the parents' relationship did not break down because of the children and the problems in their marriage that led to the parties' separation were independent of their parenting.

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[3] No detailed information was presented to the court regarding this medical matter. Dr. Much's Child Custody Evaluation states on page 1 that Emily's ear was not fully formed at birth and that she underwent several surgeries with a specialist in California.

For approximately seven years after their separation, the parents shared time with the children on an equal basis. Over a year and a half or so prior to the commencement of this litigation, however, parenting issues arose partly because Mother, who had repeatedly made accommodations for Father's shortcomings, did not want to continue making those concessions, according to Dr. Much and Mother[4].

Mother's credibility was severely impaired during this litigation. Father successfully proved that she lied under oath. In Mother's deposition held on February 20, 2004, Mother stated that there were two dead cars sitting in Father's driveway with "stuff" piled on top of them[5].
She further stated that she last saw the cars that morning[6] and reiterated that they were at

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[4] According to Dr. Much's Child Custody Evaluation, "Ms. Simonton is likely conflict avoidant. Throughout the course of the separation, she appears to have made allowances for Mr. Simonton's behavior so as to minimize potential fallout for the children. It appears that she can no longer effectively shield the children from some of the conflicts they have with their father. She continues to support Mr. Simonton's involvement in their children's lives and makes plans with him for special occasions (birthdays)." Notably, Dr. Much, Father's expert witness, did not state that Mother was alienating the children from Father. Despite Father's statement in his April 19, 2006 deposition, at page 27, that he feels that he has been hurt and alienated since the DFS investigations, the court does not find that Mother has acted to alienate the children from Father.

[5] See Mother's deposition at page 35, lines 23-24 and at page 36, line 6 (February 20, 2004).

[6] See id. at page 38, lines 18-24.

Father's house at 6:00 a.m. that morning[7]. At another deposition on April 8, 2005, however, Father's counsel produced a receipt that proved that the cars had been towed away three days before her prior deposition[8]. She excused her lack of candor under oath by stating that two junk cars have been in Father's driveway for the past five years and were only removed when this case started[9].

Understandably, Father is very upset about Mother's misrepresentation, as is the court. Nevertheless, based on extrinsic evidence from witnesses who are not members of the parties' families and the court's observations of Father's behavior throughout this litigation, the court concludes that the schedule noted below is appropriate and in the children's best interest.

13 Del. C. S 722(a) ANALYSIS[10]

1. The wishes of the child's parent or parents as to his or her custody and residential arrangements.

This factor is not dispositive. The parents have not been able to come to a meeting of the minds. Mother wishes to have a Standard Visitation Guideline schedule

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[7] See id. at page 44, lines 12-14.

[8] See Mother's deposition at page 47 (April 8, 2005).

[9] See id. at page 46.

[10] The court evaluated Father's arguments regarding the 13 Del. C. § 722(a) statutory factors, which appear at page 3 of his May 4, 2006 submission, and reaches a different conclusion than Father.

whereby Father would have the children one night a week and every other weekend, presumably with thirty five days or so during the summer. Father disagrees. He wishes to have the children fifty percent of the time. Mother testified that she believes that Father's home is stressful and that, in contrast, the children can relax at her home. She explained that the children receive what they need at her home and she wants them to have the comfort of knowing that their needs are met on a regular basis with a minimum of disruption. Mother further stated that having the Standard Visitation Guidelines schedule will eliminate problems, such as the children having clean clothes and fresh lunches or Father not getting them the materials they need for school projects. In Mother's view, these are parental responsibilities and the children should not have to be involved in those issues[11].

Father, on the other hand, testified that he fervently wishes to have the children fifty percent of the time. In his view, there has been a positive change in his parenting since he and the children started therapy with Dr. Johnson. According to Father, his parenting skills have been in a constant state of improvement since he began said therapy. He feels that he listens to the children better than he did before, and that he now tries to start or alternate their

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[11] The court sets forth Mother's position for the sake of completeness but gives this testimony less weight than it would otherwise given Mother's lack of candor noted at pages 4 and 5 above.

activities so there is an approximately equal arrangement instead of favoring one child over the other. Father believes chat, even though he has a better relationship with Ryan, he does not favor Ryan over Emily, and he is working on improving his relationship with Emily.

Father testified that he has done additional therapy with Dr. Johnson over what the court has ordered. He emphasized that he has made a commitment to therapy and undertaken other parenting training, such as a Sanford School Freedom from Chemical Dependency course and a Father's Workshop three years ago for two hours at Child, Inc. In addition, he stated that he has undertaken two series of four seminars with sessions lasting one and a half hours each with Dr. Mandelbaum at the Sanford School. Father stresses that the children have always been his top priority and that he will do anything for them within reason. In his view, some of the responsibilities of parenting involve saying "no" because he is their parent, and not their friend.

2. The wishes o£ the child as to his or her custodian (s) and residential arrangements.

This factor favors Mother. While Ryan did not express an opinion during his interview with the court, Emily indicated that she wants to have one more day a week in Mother's home. It appeared to the court that neither of the children wanted to say anything

negative about either parent, which is commendable.

Dr. Much, the expert retained by Father[12], testified that both children identified Mother as the more competent parent and expressed a desire to spend "more time" with her and "less time" with Father[13]. Given the schedule in effect as of April 26, 2005, the court notes that Emily's wish for one more day with Mother could be implemented if Mother has the children on Thursday instead of Father.

3. The interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests.

This factor is significant and favors Mother. Although Father alleges at page 3 of his May 4, 2006 summation that Mother's relationship with Mr. Bala, her admitted paramour of eight years, "may be impacting negatively on the children currently, or in the future [emphasis added]" no such evidence was presented at trial. Moreover, Father's

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[12] Although Father has a distrustful relationship with Dr. Romirowsky, the same cannot be said for his relationship with Dr. Much.

[13] See, e.g., Dr. Much's Child Custody Evaluation at page 6 in the paragraph entitled "Emily and Ryan [Shufler]" (March 18, 2005).

emphasis in the same text on the fact that the extended maternal family lives far away is not significant since there is no evidence of what impact, if any, the geographic distance has on their familial relationship. What is, instead, crucial to the court's analysis is that Emily, particularly, relates better to Mother than to Father. Father, in fact, admits that, according to Dr. Much, "Emily is more respectful regarding Mother than Father[14]."

Notably, Mother indicates that she does not see the frustrated child that Father describes in his home[15]. According to Mother, she does not have serious difficulties with Emily's behavior towards Ryan when the children are in her home.

Father described an incident whereby, when Emily was in his care, she took a set of keys in the palm of her hand and pushed both the keys and the palm of her hand against a window glass pane, breaking the glass. It is noteworthy that Father was puzzled and could not understand why the child had done this act. The court finds that this type of outburst when the child is in Father's care is

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[14] See Mr. Levine's letter at the second paragraph on page 1 (May 2, 2006). To the extent that that letter expresses a concern that the court may rely on Mr. Arrington's allegations that: (a) there were open containers of food in Father's house and (b) "Ryan is already voicing his concerns," the court does not rely on said statements since they were not presented through credible evidence at trial.

[15] According to Mr. Levine's written summation at page 3 (May 4, 1006), Father has had "to protect Ryan from Emily's physical attacks." See also Father's deposition at pages 7-8 (April 19, 2006).

significant. The court has given great weight to Father's testimony regarding the hardships that he has been experiencing with Emily.[16] In addition, Emily's noticeable frustration and behavior when in Father's care were important considerations for the court in deciding to follow Emily's wish to permit her to spend more time with Mother. While the court is willing to separate Emily and Ryan twice a month on Thursday evenings as noted elsewhere in this disposition, the court agrees with both parents' assessment that the children should primarily be kept together.[17]

4. The child/s adjustment to his or her home, school and community.

Fortunately, both children are excelling in school and in their extracurricular activities. This factor favors Mother slightly to the extent that she has been the provider of their school-related needs on a more consistent basis than Father based on the following evidence. First, Mother has provided them with a computer at home and with access to the Internet so that Emily can do her homework. At first, Father refrained from

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[16] As the court noted on the record during the trial, it is concerned about Emily's increasing level of frustration. The court partly bases its finding on its direct observation of Emily's demeanor when the child subtly, yet visibly, suppressed her anger when she was leaving the stand during the hearing. The court detailed said observation on the record during a subsequent hearing.

[17] Consistent with Mundy v. Devon, No. 174, 2006 Del. LEXIS 162, at *14 (Del. April 6, 2006), the court considered all placement options.

providing them with a computer[18] at his home and, later, he provided a computer but no access to the Internet due to his concern that such access could be abused in a manner that would be dangerous to the children. He relied on a letter from the Sanford school for support of his position that access to the Internet is not appropriate.[19] While there are a lot of children who do not have computers at home or access to the Internet, both parties enjoy a middle class standard of living[20] and are capable of providing this support to the children. To the extent that Father needs to work on issues regarding safety and privacy, he can address them in the future with the assistance of Dr. Johnson.

Second, until the spring of 2005, Mother primarily did the children's laundry even when they were in Father's care, and she regularly provided them with school clothing. Nevertheless, there were a couple of incidents when the children were not appropriately

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[18] The court is aware that Father's income in 2005 was apparently $15,000. Father, however, has not indicated that his income is in any way related to his position regarding the provision of a computer or access to the Internet.

[19] He also testified that he will, at some point, eventually provide Emily with Internet access when he considers it appropriate. He indicated that he wants to get through the custody litigation first, in part because he is concerned that if he monitors their access at home, as he believes is permissible for him to do as their parent, Mother may say that he is snooping on the children improperly.

[20] Father, for example, belongs to the Wilmington Country Club and takes the children there.

dressed for their activities when they were with Father. Emily, for example, had to wear a blouse instead of a tee shirt under her basketball uniform on one occasion and, on another, Ryan went on a field trip to the symphony in casual clothes instead of slacks and a dress shirt, which would have been appropriate. According to Dr. Romirowsky, Father's explanation to Ryan was that it was Mother's fault because she did not provide the proper clothing. Even if the court discounts Dr. Romirowsky's testimony on this matter, as Father would argue should be done based on his belief that Dr. Romirowsky is unethical and biased against him, the fact remains that when the children left Father's home for these activities they were not clothed appropriately.

5. The mental and physical health of all individuals involved.

A. FATHER

At issue among the three psychological experts is the question of whether Father has a narcissistic personality disorder, as Dr. Romirowsky believes, or whether, as stated by Dr. Much, Father merely has behavioral characteristics that are subject to positive impact by a process of counseling and therapeutic intervention. Dr. Orlov, in turn, does not believe that Father meets the criteria for narcissistic personality disorder. Dr. Orlov administered the MMPI II test to Father twice after it had already been administered by Doctors Romirowsky and Much and after

Father had an opportunity to study the test and do extensive research about it on his own. Nevertheless, Dr. Orlov testified that the test was valid for Father and that, given the high level of consistency in his answers, it was evident that Father was trying to be honest.

Given the numerous times that Father took the MMPI II and the discrepancy in the experts' evaluations of the results, the court does not place great weight on it. The court finds it somewhat significant, however, that in Dr. Much's computer-generated analysis, it is stated that, while Father is gregarious and enjoys attention[21], "[i]nterpersonally, he may be somewhat intolerant and insensitive."[22] This computer-generated observation is consistent with other witnesses' testimony and the court's observation of Father's demeanor and behavior throughout the litigation.

The court ensured that the counseling process recommended by Dr. Much was undertaken. It started in July of 2005 with the express purpose of having the children learn to articulate their needs directly to Father, rather than primarily to Mother. There is no question that both parents love the children and that both try, to the best of their abilities, to provide for their needs. While Dr. Much views Mother as being somewhat overprotective of the children and Dr. Romirowsky believes that she has had to serve

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[21] See Dr. Much's MMPI-II Adult Interpretative Report at page 3, bottom of the page under "Interpersonal Relations."

[22] Id., at middle of the page under "Symptomatic Patterns."

as the surrogate parent over the telephone when the children are in Father's care because he was not providing for them properly, both experts generally acknowledge that Father has limitations in his ability to: (a) appreciate the children's points of view, (b) communicate, and (c) provide clear information and consistent follow-through.[23]

Examples of Father's inability to communicate directly and effectively are numerous. One salient example was Father's behavior at an orthodontist's appointment for Emily. Father explained that he was anxious to see the children who had been away on vacation for the past week with Mother. He stated that he was hurt that Ryan, who was on a play date, was not present at the appointment and that Emily was already in the orthodontist's chair with work being done on her teeth when he arrived. Although Father arrived seven minutes early, Mother had arrived twenty minutes early and a patient chair had become available before Father got there. Father was upset because he did not have the opportunity to say "hello" to Emily before she went in to see the doctor even though he had arrived early.

Although he denies creating a scene at the doctor's office, Father's demeanor in the courtroom was very animated when he described the event. He explained that he was denied the opportunity to see Emily's new

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[23] Dr. Orlov did not undertake a custody evaluation, and he did not address these issues at trial.

treatment, which was distressing because this was the first time that this particular aspect of the treatment was being implemented. In describing the incident, Father explained that the doctor respected what Father was saying and the fact that starting early prevented Father from being part of it.

In the court's view, Father has lost sight that the primary purpose of the visit was to provide the dental treatment for Emily in the least disruptive way, not to assuage Father's feelings regarding his role as a parent. Moreover, the ramifications of Father's actions were significant. Thereafter, when the child appeared at the orthodontist's office, there was a blinking red light on the computer screen warning that treatment should not begin early for her. This is extremely embarrassing for a preteen[24] in what is essentially a public setting/ the doctor's waiting area. In the court's view, although Father did not necessarily intend the negative impact of his behavior, he also does not appreciate its effect on Emily.

Another example is Father's handling of the invitation to Emily to a Bat Mitzvah to which all the girls in her class were invited. In Father's view, the child celebrating the occasion was not of one of Emily's close friends, as exemplified by the fact that Emily did not know where she lived and Father was concerned that Emily had, for the first time, a

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[24] From what the court understands, Emily was twelve years old at the time.

series of three hour tests which were due to commence the week after the Bat Mitzvah. Father was also puzzled because it involved a full day of activities on a Saturday/ including transportation by bus out of town. Although Father ultimately consented, he did not permit her to take a cellular telephone, which had been provided by Mother, even though he admits that Emily has a habit of "wandering off," because he believed that it was not an appropriate item to take to a religious celebration.

Without addressing all of the details that were presented at trial regarding this incident, the bottom line is that the child had to reply to the invitation after the deadline had passed, which caused unnecessary aggravation for both Emily and the parties. Although Father pointed out that he provided the transportation for Emily both ways, he does not seem to appreciate that he complicated the matter unnecessarily and that these complications presented difficulties for Emily.

Kathy Herzog was an important witness in this court's assessment of Father's inability to communicate effectively with other adults and its effect on Emily. Ms. Herzog, a former administrator of a medical center and an involved Sanford parent who was president of the school's home and school association for four years, described a disturbing incident involving Father and Emily at the 2005 homecoming festivities. Significantly, Ms. Herzog had never met either parent prior to

said festivities. Although the aforementioned incident lasted only a few minutes and the amount of time that Ms. Herzog interacted with Father was even shorter, lasting as little as fifteen to twenty-five seconds; nevertheless, Father's interaction with her left an imprint, which was still vivid almost four months later when she testified at trial.

Ms. Herzog stated that, at the end of the homecoming festivities, she agreed to take Mother and four children to Mother's van in a golf cart because Mother was parked elsewhere. Ms. Herzog first gave Mother a ride to her van and later she returned to get Emily and her brother from the lower school. Ms. Herzog was supposed to take the parties' children to the campus sports center to meet Mother.

Ms. Herzog described that, when she came back for the parties' children, she saw Emily walking towards the lower school apparently looking for someone, and as Ms. Herzog approached closer, she saw that a man was walking approximately five paces behind the child. According to Ms. Herzog, Emily ran to the building, looking upset and the man, later identified as Father, who was still behind her, appeared to be very angry. Because Ms. Herzog knew that Mother was on her way to pick up the children at the sports center and the children would not be there if they left with Father, Ms. Herzog started to call Mother on the telephone to let her know that the children were with him.

Father, however, left in his van without Emily. He started to drive away and, as he turned towards the exit, rolled down the window to tell Emily that they were leaving, rolled the window back up and kept going. According to Ms. Herzog, there was no opportunity for Emily to get into the van since Father did not stop. Ms. Herzog started yelling for Father to wait as Emily jumped up and down looking very agitated. When Father stopped, Ms. Herzog told Emily to get into the van and that she would call Mother.
Ms. Herzog described that she held up the telephone to Father from her golf cart and asked him to tell Mother that he had the children. Father rolled down the window, took the telephone, and glared at Emily who was in the back seat. Father alternated between grinning at Ms. Herzog and glaring at Emily two to three times, which Ms. Herzog found very disconcerting. She said that he looked so angry that she took it upon herself to later redial the telephone number and tell Mother to check on Emily because she was concerned about the child.

Although Ms. Herzog testified that it was about seven car lengths, front to back,[25] from where Father exited the parking lot without Emily to where he stopped to permit her to get into his van, the court's primary focus is not whether Emily was in physical

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[25] Father's explanation, at pages 42-45 of his April 19, 2006 deposition, regarding the distance is not convincing. The court finds Ms. Herzog more credible than Father.

danger as she ran after the van amid other moving vehicles in the parking lot. Rather, the court's concern is that this credible, independent witness described another incident that clearly demonstrates Father's inability to relate to others in a way that is beneficial to the children. Although Father later testified that he was frustrated because Emily had left her sports equipment elsewhere and he knew that he would have to return to get it, the court still does not understand why he did not take the time to identify himself to Ms. Herzog, confirm that he is the children's father, and wait for Emily to get into his van. A minor situation that could have been handled easily if he had behaved appropriately, turned into a disturbing incident which probably upset Emily and, at best, made her feel uncomfortable in front of a stranger.

Two other examples of Father's inability to relate to other people were provided by Lisa Kuntz, a notary, and Stephanie Rocowitz, Emily's past teacher and advisor. Ms. Kuntz testified that she met Mother for the first time when she notarized a pleading for this case in June of 2004 and that she met Father afterwards when he came to her place of business to complain that she had done her job incorrectly. According to him, the date of her notarization was not the same as the date of the filing. Ms. Kuntz said that Father became argumentative and aggressive during their confrontation, which made her a little uncomfortable. Also, he did not leave right

away when she asked him to do so and only left after she asked him a second time. According to Ms. Kuntz, Father was very upset and nervous. Although the incident lasted only fifteen or twenty minutes, it was significant enough for Ms. Kuntz to write down Father's car tag number and call Mother to tell her what had happened.

Stephanie Rocowitz, in turn, testified that, while Father is supportive of Emily and encourages her in her school work, his actions at Parent's Night were inappropriate.[26] Ms. Rocowitz' description of Father's behavior on Parent's Night again demonstrates Father's inability to assess people's reactions to him and respond appropriately.

Ms. Rocowitz said that she only had eight minutes to do her presentation to all of the parents on Parent's Night. According to her, Father tried to monopolize the conversation and became argumentative. Although she had just finished her explanation of a parent's role in homework, he continued to ask her questions which caused her to repeat herself and waste time. Emily's teacher said that Father would not let the issue go even though other parents were telling him to stop. Later in the year, Father was upset that the children did not have homework or structured classes during Native American week and

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[26] The court finds Ms. Rocowitz's testimony, namely that Emily has rolled her eyes once or twice in front of her when Father is speaking, is insignificant.

spoke to Ms. Rocowitz about it in a way that also made her uncomfortable.

B. MOTHER

Although Mother has been treated for depression in the past, there was no evidence presented that this condition affects her parenting ability. Both Dr. Romirowsky and Dr. Much administered the MMPI II test to her and neither doctor testified that either Mother's anger issues or possible substance abuse were a concern.[27]

This factor favors Mother based on the testimony regarding the parents' respective abilities to relate to others and its impact on Emily.

6. Past and present compliance by both parents with their rights and

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[27] The court independently notes that Mother's MMPI II Report computer-generated report by Dr. Romirowsky noted "Personality Traits": "She displays an unusually strong tendency to suppress or control hostility. While suggesting that she seeks to tolerate much frustration without responding aggressively, this also raises the issue of whether she is consistent in this area. Over control or excessive denial may result in frustration, tension, and the possibility of sudden outbursts of anger or aggression that are out of proportion to circumstances." The court additionally notes that Dr. Much's computer-generated report regarding Mother showed that further evaluation of substance use or abuse was strongly recommended. The court places limited weight on the MMPI II reports but sets them forth for the sake of completeness. As both experts explained, the MMPI II serves as a guide for possible hypotheses, but other data, including clinical observations and interviews, are also considered.

responsibilities to their child under §701 of this title.

Both parents have generally acted in accordance with their responsibilities towards the children.[28] To the extent that Mother was more proactive in taking care of their clothing needs and school supplies, this was by tacit agreement of the parents, rather than due to Father's unwillingness to do so. In this case, it is not a question of one parent providing while the other one is not. Rather, it is a question of one parent being able to identify the children's needs and desires in a way that is appropriately child-centered rather than parent-centered.

To the extent that Mother alleges that Father did not provide a proper home for the children, his home was not clean and the children had to take showers at the Wilmington Country Club because the bathrooms at his home were dirty, the court expects that those matters have been corrected. Father was ordered by this Judge in April of 2005 to provide a cleaning schedule by which he would abide and the court has no reason to believe that he has not done so during the last few months.

The court notes that there was one incident, which occurred early on in the litigation, where a maggot was found in one of

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[28] Both parents have served as homeroom parents at school and both teach Sunday school at church. According to Father's written submission, he has coached soccer and basketball, ushered at church for seven years, and taught Vacation Bible Camp for two summers.

the children's lunch bags after said bag went from Father's home to Mother's home via school. Father minimized the importance of this evidence and challenged Mother's credibility on it.[29] While the court does not approve of maggots in children's lunchboxes, it does not put great weight on this one incident for two reasons: (1) the DFS investigation found that the charges of abuse against Father due to the physical condition of the home were unfounded and (2) Mother's testimony is not sufficiently credible due to her lack of candor about Father's junk cars noted at pages 4 and 5 of this disposition. The court is cognizant that DFS was not able to conduct an unannounced visit to Father's home. Nevertheless, it is evident that Father is capable of cleaning the house, and the court expects the improved condition to continue after the cessation of this litigation.

In response to Mother's allegation of unclean facilities at his home, Father points to the fact that the children live on the second floor of his house while they live in the basement in Mother's home. In his view, this is the worst setting for someone with asthma, such as Ryan, who has a mild condition. Father further explained that Mother has wall-to-wall carpeting in her home while he has oak floors. The court has evaluated all of the evidence presented regarding the conditions of both homes and finds that this

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[29] Father's deposition at page 11 (April 19, 2006) contains his additional statements on this matter.

factor favors Mother only slightly in light of Father's improvement in this area and the lack of substantiation by DFS after investigating Mother's allegations regarding the cleanliness of Father's home.

7. Evidence of domestic violence as provided for in chapter 7A of this title.

There was no credible evidence presented under this factor. According to Father, Emily acts out from time to time when she is in his care and he has had to physically stand between the two children in order to prevent her from physically abusing Ryan. For example, Father said that she once used karate on Ryan while they were visiting the paternal grandmother. When he told her to stop and she did not, he locked Emily outside the paternal grandmother's house in an attempt to control her. Father said that he used this alternative, because they were at someone else's home and he could not send her to her room, which is his usual method of discipline. According to him, she was only outside for approximately ten minutes.

The court does not find this factor to be dispositive. There is no indication that there has been any physical domestic violence by either parent. On the question of whether there has been psychological abuse, the court does not have sufficient information. Ms. Herzog' testimony regarding Father glaring at Emily may suggest that possibility. However, her testimony alone is insufficient evidence for

the court to find that Father committed psychological abuse.

8. The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

There was no evidence presented to the court regarding this factor.

CONCLUSION

Based on the evidence presented, **IT IS ORDERED** that the children shall be with Mother on Thursday nights instead of Father during the school year. This will essentially result in an alternating weekend schedule and a Wednesday overnight[30] with Father during the school year in accordance with the Standard Visitation Guidelines.

In order to encourage a more intensive and meaningful one-on-one relationship

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[30] The court is aware that the Standard Visitation Guidelines provide for a Wednesday visit from 5:00 p.m. to 8:00 p.m., and not a Wednesday overnight. However, the court finds that, in light of the shared arrangements previously in existence. Father's involvement in the children's activities and the desirability of encouraging the relationship between Father and the children through regular contact, a Wednesday overnight is appropriate in this case. Moreover, Mother's counsel, Mr. Arrington, acknowledged at page two of his April 13, 2006 letter that "[n]otwithstanding the contests put forward in litigation, most life events occur smoothly and without incident" and, in response to the court's request for a suggestion on possible arrangements and associated transportation, noted "it may be consistent with the children's best interests to modify the standard visitation for Wednesday from a dinner visit to an overnight visit with Father." The court concurs.

between Father and each of the children, the court considered the possibility of having each of the children spend time alone with Father on a regular basis. However/ both parents opposed this. Mother suggested, in her attorney's April 13, 2006 letter at page 2, that Father could have the children after school on alternate Thursdays until 7:00 p.m. Father, in turn, did not give the court any specifics in response to its inquiry, but instead, he gave examples of when he had spent time with each child. He further explained that he has continued to follow Dr. Mandelbaum's advice that he received at a parenting workshop and has used transportation times to have one-on-one conversations with the children.

The court will not force the issue of Father and Emily having some structured one-on-one time since Father apparently believes that he has sufficient opportunities for it under a schedule that gives him both children at the same time. However, the court is cognizant that Father and Ryan have a less confrontational relationship than Father has with Emily, and therefore, the court believes that having more time with Father would be beneficial for Ryan. For that reason, Father shall pick up Ryan on alternate Thursdays from school and have him until 7:00 p.m. at which time he shall return the child to Mother's home. The first Thursday under this arrangement shall be the second Thursday after the date of this order. If Father's Thursday evening visit with Ryan interferes with Mother's holiday or vacation time with

the children. Father shall have the prior Thursday with Ryan even if it means that he will have Ryan for two consecutive Thursdays after school. The court does not agree with Mother's assertion that this arrangement will cause Ryan to feel that he has somehow been "stuck" with Father or that he is being punished. It is evident that Father and son enjoy watching sporting activities together and Ryan is only ten while Emily, who already has a contentious relationship with Father, has already entered her teenage years.

Father shall have the children for half of the summer vacation and half of the spring and winter breaks. The previously ordered vacation, holiday and school break schedules and procedures, including those for notification, shall continue in effect.

The counseling with Dr. Johnson shall continue until further court order. The court does not order Mother to participate in said counseling, despite Father's request, because it does not believe that it would be fruitful. Moreover, although the court is pleased that there has been progress in Father's ability to relate to the children as a result of the therapy with Dr. Johnson, it appears to the court that there is still significant work to be done by Father in this regard.[31]

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[31] Dr. Much suggested twice that there should be an additional six months or so of counseling with a 7/7 schedule thereafter. The court, however, believes that this litigation has lasted long enough. It commenced almost two years ago and Father has already had the benefit of several months of therapy with the children. For example, Father and the children had

The court reserves decision on the question of how to allocate the expense of the deposition of Father's direct testimony until after June 5, 2006. The court rescinds the portion of its prior order which requires the parents to participate in the proposed parent coordinator program.

/S/
AIDA WASERSTEIN, JUDGE

AW: jh
Cc: Michael W. Arrington, Esquire
Norman E. Levine, Esquire
File
Date to be picked up: 06/02/06

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twenty-four therapy sessions with Dr. Johnson between July of 2005 and February of 2006.

While it is beneficial for the children that his parenting skills have improved, the court does not believe that requiring an additional six months of therapy and a review at that time of the status quo is in the children's best interest. Instead, it is important to give this family some closure and let them go on with their lives. The court continues to require Father to go to counseling with the children because it believes that the support of the counseling process is necessary in order to continue to improve his ability to relate to them.

The Family Court of the State of Delaware
In and For New Castle County
Civil Disposition – Judge

Petitioner	Attorney
Judy Shufler[1]	Michael W. Arrington, Esq.

Respondent	Attorney
Jamal Shufler	Norman E. Levine, Esq.

Before The **Honorable Aida Waserstein**, Judge of The Family Court of the State of Delaware:

File No.	CN01-11049
Petition Nos.	03-33321
Nature of Proceeding	Motion for Clarification//Reargument/Reconsideration; Motion to Leave to Respond
Date of Last Submission	06/26/06
Date of Hearing	None
Date of Decision	07/26/06

Before the **HONORABLE AIDA WASERSTEIN, JUDGE** of the Family Court of the State of Delaware:

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[1] To help protect the parties' privacy at this stage of the proceedings and pursuant to Supreme Court Rule 7(d), this court uses the same pseudonyms as were used by the Delaware Supreme Court in its April 13, 2006 decision refusing an interlocutory appeal in this case.

This is the Court's decision on two motions that followed its final custody Order dated June 1, 2006 (hereinafter "June 1st Order"). Before the Court are a Motion for Clarification, Reargument and Relief from Judgment Based on Newly Discovered Evidence of the Court's June 1st Order filed by Jamal Shufler (Father), through his counsel, Norman Levine, Esquire, Mother's Response thereto filed through her counsel, Michael Arrington, Esquire, Father's Motion to File Reply to Mother's Response, and Mother's Response thereto. Pursuant to Family Court Rule 59(e),

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's opinion or decision. The motion shall briefly and distinctly state the grounds therefore. Within 10 days of service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion.

Father's motion was timely filed pursuant to Family Court Rule 6(a) because the ten day deadline ended on a Sunday.[2] Likewise,

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[2] Fam. Ct. Civ. R. 6 (a) provides, in pertinent part, that:

> In computing any period of time prescribed or allowed by these Rules, by order of Court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday,

Mother's response was timely.

Father's multi-captioned motion requests three types of relief: clarification, reargument, and relief from a judgment based on newly discovered evidence. The Court addresses each request separately below.

Clarification

Father's motion requests that the June 1st Order be clarified to provide that the new school year visitation calendar commences in September of 2006. Mother denies that the Order is unclear but admits that the children's school year begins in September. In an abundance of caution, the Court clarifies its June 1st Order to provide that the new school year visitation schedule will begin in September of 2006 once the parties' children return to school. Until then, the summer schedule shall be in effect.[3]

Reargument

Father requests that the Court modify its June 1st Order by ordering that: 1) summer vacation shall be divided 50/50 after allowing Father's make-up visitation time, including one week in August of 2006 and three

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in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

[3] The Court's June 1st Order provides that the parties shall split the summer 50/50. The Court clarifies this Order to provide that Father shall receive one week of make-up time in August of 2006 prior to the 50/50 split. The Court denies Father's request for three additional make-up days. The parties are responsible for creating a schedule in accordance with this ruling.

additional make-up days; (2) Father shall have the children on Thursdays from after school until Friday morning at school during the school year; (3) the Order be corrected to reflect that Mother opposed one-on-one time with the children and Father was neutral; (4) therapy with Dr. Johnson be limited to a finite period of time such as six or twelve months; (5) Mother be encouraged to participate in therapy with Dr. Johnson; and (6) both parents be encouraged to participate in the Parent Coordinator Program when the program commences.

Family Court Rule 59 (e) tracks Federal Rule of Civil Procedure 59 (e). Therefore, federal case law, as well as Delaware case law, may provide guidance when resolving an issue under Rule 59(e).[4] Under Delaware law, parties cannot use Rule 59 (e) to raise new arguments.[5] Under federal law, a Rule 59 (e) motion may not be used to relitigate old matters or to raise arguments that "could" have been raised prior to the Court's opinion

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[4] See Plummer v. Sherman, No. 99C-08-010 RRC, 2004 Del. Super. LEXIS 7, *3 (Jan. 14, 2004) (holding that federal case law may provide guidance when resolving an issue under Delaware Superior Court Civil Rule 59(e) because Superior Court Civil Rule 59 (e) tracks Federal .Rule of Civil Procedure 59(e)).

[5] Id., citing Carlozzi v. Fidelity and Casualty Co., No. 99C-03-083-JRS, 2001 Del. Super. LEXIS 217, *3-4 (June 27, 2001) (holding that motions for Reargument will be denied where they rely on grounds not raised in the original proceeding or where they merely advance the same matters that were already considered in the original proceeding).

or decision.[6] Instead, a motion for reargument is the proper device for seeking reconsideration by the Family Court of its findings of fact, conclusions of law, or judgment. The manifest purpose of Rule 59 motions is to afford the trial court with an opportunity to correct errors prior to appeal.[7] A Rule 59(e) motion "will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[8]

1. Summer Vacation

In his motion, Father alleges that the Court improperly failed to indicate in its June 1st Order how the summer should be divided to achieve the 50/50 split, which has allegedly resulted in Mother claiming that Father may only have five hours with the children on Father's Day. Mother admits that the Order does not designate specific weeks because the Court left it up to the parties. Mother contends that she drew up a summer schedule that

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[6] Id. , citing FDIC v. World University, Inc., 978 F.2d 10 (1st Cir. 1992) (holding that parties should not use Rule 59 (e) motions to raise arguments which "could, and should," have been made before a judgment was issued).

[7] Beatty v. Smedley, No. OOC-06-060-JRS, 2003 Del. Super. LEXIS 437 *5 (Mar.12, 2003), citing Hessler, Inc. v. Farrell, 260 A.2d 701, 702 (Del. 1969).

[8] Id. at *6 (quoting DELJIS v. Gannett Co./ No. 01C-01-039, Witham, J. (Del. Super. Jan. 17, 2003) (Mem. Op. at 4) (citations omitted).

allows for Father's extra week in August of 2006, vacations already planned, and the 50/50 split and gave it to Father on June 10, 2006. With respect to Father's Day, she alleges that Father chose to have a week of vacation with the children from June 10, 2006 at noon until June 17, 2006 at noon. Because the following day was Father's Day, Father insisted, and Mother acquiesced, that he keep the children overnight on June 17, 2006, instead of returning them to Mother at noon that day and picking them up the next day to celebrate Father's Day. Therefore, according to Mother, Father had seventeen hours with the children on Father's Day, and not five hours, as he alleges.

The Court issued an Order on June 12, 2006, requesting proposed summer schedules from the parties for the summers beginning in 2007. When the Court receives those submissions, it shall set a summer schedule beginning in 2007. There is a hearing scheduled for December 11, 2006 to discuss alleged violations of the Court's Order in the summer of 2006 including the Spacer asthma camp matter; if these issues are moot and the hearing can be cancelled, counsel shall inform the Court by November 20, 2006. This Court shall not take this opportunity to set a summer schedule for 2006 because it is already mid-July and the Court does not have enough information before it so as to not interfere with the children's camps and parties' vacation plans. In addition, the Court originally decided against establishing a rigid

summer schedule based on the parties' assurances that they could work out a schedule amongst themselves.[9]

2. Thursday Overnights

The Court addressed Father's request to have both children stay with him overnight on Thursdays in order to accommodate his long-standing counseling appointment with Dr. Johnson in its Interim Order dated June 16, 2006. Because Father filed a Motion for Reargument of that Order to which Mother responded, the Court shall address this issue in a later disposition. At that time, the Court shall not only take into consideration the allegations set forth in Father's Motion for Reargument and Mother's Response, but also the allegations set forth in paragraphs 9-11 of Father's Motion for Clarification and Mother's Response.

3. One-On-One Time

Father contends that the Court improperly noted in its June 1st Order that both Mother and Father opposed one-on-one time when Father was, in fact, neutral to the idea. Mother admitted that she was opposed to any one-on-one time but was unaware of Father's feelings on this issue.

The Court's June 1st Order found that both parents were opposed to alone time with the children. Regarding Father, the Court

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[9] See Turner v. Turner, 1999 Del. Fam. Ct. LEXIS 49 *5 (Jan. 25 1999) (holding that the purpose of reargument is not to allow new issues to be raised by the parties that were not raised in the initial hearing).

based its finding on his April 13, 2006 letter, wherein he evaded the question of whether he would like the Court to consider giving him alone time with each child.[10] Because Father neither affirmed nor denied a desire to spend time with each child in his April 13 / 2006 letter, the Court now finds that it is more appropriate to regard him as being neutral to the idea rather than opposed. Therefore, Father's request is granted, and it is hereby noted that, while Mother was opposed to one-on-one time with the children. Father was neutral to the idea.[11]

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[10] Father's April 13, 2006 letter provides, in pertinent part, that:

> Without having the Court's final order, any recommendations would be theoretical and based on an assumption of what the Court's final parenting time order would be. For example, if one assumes that the Sunday nights would be divided equally, the scheduling of individual time may be different, than if one assumes that Mother would have every Sunday evening.

[11] The Court finds it noteworthy that, while Father is apparently neutral to the idea of alone time with the children, in the motion at issue, he, in effect, requests the Court to do away with any" alone time either parent currently has with the children by requesting that he have both children Thursday nights instead of just Ryan on alternating Thursdays. This kind of inconsistency is found throughout Father's motions and makes it difficult for the Court to determine Father's overall position on several issues. For example, Father, in paragraph 19 of the motion at issue, requests that Mother be ordered to partake in counseling with him and the children, but, in his Motion to Reply to Mother's Response, filed two weeks later, he contends that the therapy is about improving the Father-child relationship and that Mother does not respect his privacy in this regard. Similarly, in a Motion for Reargument of the Court's Order dated June 16, 2006, which Father filed on the same day as his Motion to

4. Counseling for Father

Father requests that the Court order that his mandatory therapy with Dr. Johnson be limited to a finite period, such as six or twelve months. As it stands, counseling with Dr. Johnson is mandatory until further Court Order. Mother alleges that therapy should continue until such time as the counselor is able to report to her that Father has improved sufficiently to point that therapy is no longer necessary.

The Court's June 1st Order required Father to go to counseling with the children for an indefinite period of time based on its belief that the support of the counseling process was necessary in order for Father to continue to improve his ability to relate to the children and that there was still "significant work to be done by Father in this regard." It does not appear from Father's pleading that he objects to going to counseling. Instead, he objects to the indefinite time period.

The Court shall not order a definite end date for counseling, but rather, it shall put the decision in the hands of Dr. Johnson, who is qualified to make such a decision. At such time as the therapist believes that counseling is no longer necessary for Father and the children,

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Reply to Mother's Response, he argues that it would be inappropriate for Mother to pick Emily up from the therapist's office on alternating Thursdays, because "it will invite further breaches of the privacy of the therapeutic sessions." It appears to the Court from these three motions that Father, on one hand, wants Mother to be ordered to attend therapy sessions with him and their children and, on the other hand, to not be permitted to speak to the therapist or even wait outside the door to his office during their sessions.

he shall so inform Father and Mother, in writing, and counseling shall cease. The purpose of the notice is to keep both parents informed since there is a Court Order in place for Father to go to counseling. Dr. Johnson's notice to Mother shall not include any treatment notes or progress reports. It shall merely state the date that the treatment ceases.

5. Counseling for Mother

Father alleges that the Court improperly excluded Mother from therapy with Dr. Johnson thus depriving the children and Mother of the benefit of Mother's participation in it. The Court's June 1st Order provided that Mother did not have to participate in counseling with Dr. Johnson because her participation would be at odds with the underlining purpose of the counseling, which was for the children and Father to find ways to better relate to each other. The Court is puzzled by Father's insistence that Mother participate in the counseling sessions due to the concerns that he has voiced throughout this case about her alleged invasions of privacy into his therapeutic relationship.

Father's request for the Court to encourage Mother to participate in counseling is denied, except when the therapist personally invites her to attend for the benefit of the children. The Court does not expect her to attend weekly sessions because the main

purpose of the therapy is to improve Father's ability to communicate with the children.

6. Co-Parenting Program

Father requests that the Court encourage the parties to participate in the co-parenting program. After reviewing the file, the Court finds that it has already encouraged the parties to participate in the program in a Letter Order dated May 4, 2006, in which it stated that, because the program expects the parents to agree to participate/ the Court cannot order them to do so but hopes that the parents will find their way to agreeing to such an arrangement. For reasons of judicial economy, the Court denies Father's request since the June 1st Order was issued less than a month after the Letter Order.

Relief from Judgment

Father requests that the Court modify its June 1st Order by (1) striking references to Father abiding by the children's wishes regarding the Internet; (2) striking the Court's finding regarding the children's wishes in reference to visitation; and (3) provide that the interim order previously in effect for the school year should continue.

Father first alleges that the June 1st Order improperly "found fault in Father's failure to listen to the children's desire to have internet (sic) access" based on newly discovered evidence and that it "should be modified to delete criticism of Father and to delete the reference to Father needing to work

on issues regarding safety and privacy in the context of the children's access to the internet (sic)." Father also requests that the Court order Mother to submit a safety plan regarding the children's Internet access when at her home. Father attached as Exhibit A to his motion a page entitled "The Most Venomous Snake in the World," which was apparently retrieved from the website http://www.tasgreetings.com/thesnake.htm by one of the, children.[12]

Mother denies that the print-out is "newly discovered evidence" because it is dated March 5, 2006, two months prior to the Order. She also contends that she monitors web sites visited by the children on a regular basis, and therefore, should not have to submit a safety plan.

Secondly, Father alleges that Mother recently informed him that, on January 9, 2006, the evening before the children were interviewed by the Court, Judy Jones, Mother's former counsel, came to her home and coached the children. Mother denies the allegation contending that Ms. Jones merely said "hi" to the children and that she was there only to drop off copies of recent Court Orders. She also contends that none of Father's allegations are "newly discovered evidence" nor do they meet the standards for a Rule 59 (e) motion.

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[12] While Mother alleges that Ryan printed the page. Father contends that Emily printed it and that Ryan obtained it from her.

Although Father requests relief from judgment based on newly discovered evidence, he does not explain under what Rule he proceeds. It appears, from the relief that he is requesting, that he is trying to proceed under Family Court Rule 60(b) (2), but that Rule requires that the time to request a new trial has expired before the motion is filed. However, that is not the case here; Father filed his motion within ten days of the Court's June 1st Order and Rule 59(b) provides that "[t] he motion for a new trial shall be served and filed not later than 10 days after the entry of judgment."[13] Because the time to request a new trial under Rule 59 (b) had not passed when Father filed the multi-captioned motion before the Court today. Father is procedurally barred from filing a Rule 60(b)(2) motion.

In addition, Father has not proved that there is "newly discovered evidence" as required by Rule 60(b)(2) . The Delaware Supreme Court has stated that:

> Delaware law on standards governing the grantor denial of a Rule 60(b)(2) motion is well settled. An applicant seeking relief "from a final judgment, order or proceeding [on the grounds of] newly

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[13] Fam. Ct. Civ. R. 59 (b) provides, in pertinent part, that "[t]he motion for a new trial shall be served and filed not later than 10 days after the entry of judgment. The motion shall briefly and distinctly state the grounds therefore."

> discovered evidence" must show that: [1] the newly discovered evidence has come to his knowledge since the trial; [2] that it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; [3] that it is so material and relevant that it will probably change the result if a new trial is granted; [4] that it is not merely cumulative or impeaching in character; and [5] that it is reasonably possible that the evidence will be produced at the trial.[14]

In this case, Father is the applicant, and therefore, he has the burden to show .that there is "newly discovered evidence" as defined by the five factors listed above. The Court finds that Father has failed to meet his burden regarding either the print-out attached as Exhibit A to his motion or Mother's alleged admission that her counsel coached the children prior to their interviews with the Court. First, although Father indicates that the two pieces of evidence "recently" came to his attention, he does not state whether it was before or after the last hearing on April 28, 2006. Secondly, he gives no reason why they could not have been discovered prior to the last

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[14] Levine v. Smith, 591 A.2.d 194, 202 (Del. 1991) (citing In re Missouri-Kansas Pipe Line Co., 2 A.2d 273 (Del. 1938)).

hearing, in light of the fact that the alleged coaching incident happened over three months before the hearing and the print-out is dated almost two months earlier. More importantly, he has not given the Court any reason to believe that this evidence is so material that it would change the result of the trial if a new trial was granted, because the children's wishes were but one factor considered and the availability of internet access for the children in the parties' homes was not as significant an issue at the custody trial as Father seems to believe.

1. Internet Access

After reviewing both Exhibit A to Father's motion and the website from which it came, the Court finds that it is not an appropriate website for children. From Mother's response however, it appears that she does not understand the word play contained in the exhibit.[15] While the Court does not require Wife to submit a safety plan regarding the children's Internet access, as Father requested, it cautions her to supervise the children's access more closely. She may choose the method of supervision. The Court, however, suggests that she investigate installing software to block access to inappropriate websites. If the therapist thinks it would be beneficial to discuss the print-out and the circumstances surrounding it with

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[15] The "Most Venomous Snake in the World" is a man's penis, according to the website.

Mother and the children, then Mother shall attend that counseling session.

2. Children's Interviews

The Court takes Father's accusation of impropriety by Ms. Jones seriously. However, based on Ms. Jones' history before this judicial officer and Mother's credible explanation,[16] the Court does not take any action.

Motion for Leave to Reply

In his Motion to Reply to Mother's Response, Father requests that the Court permit him to file a reply to Mother's response to demonstrate to the Court that her response includes misstatements and untruths. Mother denies such allegations and requests that the Court deny Father's Motion for Leave to Reply as frivolous and impermissible under Family Court Rules.

The Court denies Father's Motion for Leave to Reply. There is no basis in the Family Court Rules to permit such a reply. Family Court Civil Rule 59(e) provides, in pertinent part, that "[t]he Court will determine from the motion and the answer whether Reargument will be granted." This Court does not go beyond the scope of Rule 59(e) to consider either paragraph five of Father's Motion for Leave to Reply or Mother's Response thereto.

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[16] Three Court Orders were issued in the week leading up to the January 10, 2006 hearing when the Court interviewed the children.

This is a final Order.

IT IS SO ORDERED.

/S/
AIDA WASERSTEIN, JUDGE

AW: jh
Cc: Michael Arrington, Esq.
Norman Levine, Esq.
File
Date Mailed: 07/27/06

The Family Court of the State of Delaware
In and For New Castle County
Civil Disposition – Judge

Petitioner	Attorney
Judy Shufler[1]	Michael W. Arrington, Esq.

Respondent	Attorney
Jamal Shufler	Norman E. Levine, Esq.

File No. CN01-11049
CPI No. 03-33321

ORDER

Upon a Motion and Affidavit for Attorney's Fees.

Waserstein, J.
November 2, 2006

Before the Court are all the Affidavit of Attorney's Fees filed by both attorneys for Judy Shufler ("Mother") and any responses thereto filed by Jamal Shufler ("Father"), Mother has incurred $61,511 in attorney's fees and costs[2] in litigating a fairly simple and straightforward custody case due to extremely

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[1] The pseudonyms used by this Court in its April 13, 2006 decision in this case are being used.

[2] This figure does not include finance charges because no evidence was presented to the court on this question. It also does not include $1,500 worth of work done by Judy Jones, Esquire on 1/30/06, 2/3/06, 2/6/06, 2/7/06, 2/9/06, 2/13/06 or 2/14/06 which was denied on 3/23/06.

litigious behavior by Father. Father filed thirty motions, seven of which were filed after the final order in the case. Twenty-two of the Motions were denied. Father, in turn, incurred significant fees which he did not bother to total for the benefit of the Court. However, it is evident that he was billed by two attorneys for approximately 249.70 hours at the rate of $275 and $290 an hour respectively which total $73,121.94 in fees and costs. One attorney billed consistently at the rate of $290 an hour while the other attorney started at $275.00 an hour and ended at $290.00 an hour.

ATTORNEYS' FEES AND COSTS

The Court has broad discretion in awarding fees and costs under 13 Del.C. §1515. That statute specifically ties awarding fees and costs to the financial condition of the parties.[3] An underlying purpose of the statute is to equalize the position of the parties by providing a financially disadvantaged party with the financial means to prosecute or defend divorce proceedings.[4] However, as noted at page 3 below, litigiousness is also a primary consideration.

Standard

Family Court Civil Rule 88 requires the Court, in determining the reasonableness of

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[3] Husband B.W.D. v. Wife B.A.D., 405 A.2d 123 (Del. 1980).

[4] Gray v. GM. 503 A.2d 198 (Del. 1986).

litigation costs incurred by the parties, to consider: (1) time and expense expended; (2) an itemization of services rendered; (3) relevant hourly rates; (4) itemization of disbursements claimed; (5) any sums received or that will be received with respect to legal services and/or disbursements; and (6) any information that will enable the Court to properly weigh the relevant factors set forth in Rule 1.5(a) of The Delaware Lawyer's Rule or Professional Conduct.[5]

Essentially, the Court must decide applications for litigation cost in light of any disparity between the income and expenses of the parties, the values of property interests of the parties, and any other factors in the particular case which should be considered in

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[5] 5 Rule 1.5 states:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer performing the service; and
> (8) whether the fee is fixed or contingent.

making an award of litigation costs.[6] Finally, the Court may consider any extreme litigious position of one or both parties which results in an increase in litigation costs.[7] While parties to domestic litigation are encouraged to arrive at amicable resolutions in order to avoid costly trials, the Court recognizes the emotional tumult that accompanies such litigation and may lead to highly adversarial stances.[8]

Analysis

Mother conservatively estimates that "unnecessary delay caused by Father's conduct extended the matter by fifty-percent." The exact impact of the behavior in question is difficult to quantify in this manner. Examples of Father's litigious and confusing conduct, however, include the following:

1. Father repeatedly asked to depose Dr. Romirowsky, the expert retained by Mother and sent numerous letters to Mother's counsel asking that Mother schedule the appointment despite the fact that Mother's counsel told him on several occasions that he could coordinate directly with Dr. Romirowsky's office which Father refused to do. Instead, Father

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[6] Travers v. Travers, Del. Fam., File No. 806-85, Gallagher, J. (Jan. 30, 1987).

[7] Mays v. Mays, Del. Supr., File No. 364, 1987, Christie, C.J. (Nov. 23, 1988).

[8] Bristol v. Linn, Del. Fam., File No. 1969-85, James, J. (May 30, 1990).

filed at least two frivolous motions regarding this matter. The Motion to Schedule Dr. Romirowsky's Deposition was denied. The Notice of Continuance of Deposition complained, in part, that Mother had failed to provide Father with a new proposed date after Father's counsel had filed a Notice of Deposition that conflicted with Father's schedule. After seven months of effort on this matter, Father apparently cancelled the deposition without giving a reason. Mother estimates that the attorney's fees and costs incurred by her for this were $2,846/ which Father denies. Moreover, Mother also scheduled and cancelled the depositions of Dr. Much and Dr. Orlov. Therefore/ the Court gives less weight to Father's behavior in reference to Dr. Romirowsky's deposition than it would have if Mother had also not cancelled the two other experts' depositions.

2. The Court's order that Father seek therapy with the children during the pendency of the proceedings was unduly complicated by Father's excessive correspondence on the issue and his contradictory stance in reference to the therapy. Mother estimates that she incurred attorney's fees and costs of $1,075 on this aspect of the case. Father responds that selection of the therapist was a matter for the Court's consideration, as opposed to choosing

from a list of therapists suggested by Mother. The Court disagrees. It is the Court's policy to encourage the parties to cooperate in making these types of decisions for their children's benefit.
3. Father's inconsistent position that his privacy was being invaded by Mother's interference in the therapy with Dr. Johnson and his opposite insistence that Mother be required to participate in the therapy.
4. Father's insistence that the Court ask the children 373 questions during court interviews. 205 were intended for the daughter and 168 for the son. In contrast, Mother proposed a total of 18 questions.
5. Father's disruption of the children's therapist's office by sitting outside the hall by the office door, instead of the waiting area, after the Court had permitted him to tape the children's interviews with Dr. Romirowsky, an unusual procedure which the Court allowed to help assuage Father's fears regarding the fairness of the process.
6. The filing of a Motion for Reargument even though the Motion had been granted at a prior hearing. The April 11, 2006 Order addresses this issue.
7. Father's claim that he was put in an "unfair" position by an order that gave him the first week of spring vacation in even numbered years and the second one in odd numbered years because

Mother's birthday may fall on his week, despite the fact that Mother did not raise an objection to this aspect of the Order.

8. Father's insistence, which is discussed in the March 2, 2006 Order, that Ms. Milligan and Mr. Berkowitz testify in person even though the Court struck Ms. Milligan's testimony off the record and did not rely on it, and the Court repeatedly stated that the issue on which Mr. Berkowitz would testify was more properly addressed in another forum.

9. Father's objection to his testifying before the experts even though repeated accommodations were made for experts, such as Dr. Orlov, whose testimony was particularly difficult to schedule. Dr. Orlov was Father's expert.

10. Father's lack of flexibility regarding the scheduling of Ms. Herzog, an out of town witness who was in town and available on a day for which trial had been scheduled. Pages 8 and 9 of the March 1, 2006 disposition address this matter and the twenty-eight numbered findings of fact at pages 9-11 of said disposition gives a flavor of the kind of litigiousness evident throughout this case. The Court considered Father's argument that Mother did not file a Motion to have Ms. Herzog's testimony earlier until four days before the hearing. Nevertheless, the Court found

Father's behavior during the hearing in question to be unreasonable and the Court corrected any potential disadvantage to him on the day of the hearing by giving him time to prepare and depose Ms. Herzog prior to her direct testimony. Since the Court was not previously aware that Mother allegedly failed to disclose Ms. Herzog's name at Mother's November deposition, the Court is not able to assess Father's claim in that regard. However, the time awarded to him to prepare for and depose Ms. Herzog cured any problem presented to him by Mothers failure to disclose.

Mother emphasizes that there was unnecessary delay and attorney effort because: a) the April 25, 2005 hearing was postponed at the last moment due to the unexpected illness of Father's counsel; b) Father's demand for extra time for his direct examination resulted in a trial deposition which Mother's counsel asserts netted no new information and c) Father repeatedly sent unnecessary correspondence to the Court. The Court did not give weight to the first two items. His counsel's illness was not Father's fault and the Court gives Father the benefit on the doubt on the question of whether he overestimated the importance of the additional direct testimony to be provided by him. The Court, however, agrees that the amount, length and content of the correspondence was excessive but is also

cognizant that it is difficult, if not impossible, to track directly the amount of effort expended on each aspect of each letter.

Father also asserts in the September 11, 2006 Motion to Dismiss, which was denied, that Mother failed to file a timely affidavit for attorney's fees by March 1, 2006, which Mother admits. More importantly, however, Father failed to heed this Court's warning of March 20, 2006. At the time, the Court denied Mother's request for fees conditionally even though Mother requested an extension. In the March 20th disposition, the Court noted: "The Motion is denied if no other fees are sought. If other fees are sought, a Motion to include these fees may be filed". This statement is noteworthy for two reasons.

First, it rebuts Father's allegation in the Motion to Dismiss that numerous requests by Mother for fees were denied with one exception and supports Mother's position, in her Response, at paragraphs 3 and 4 that: a) her comprehensive request for fees is timely, given that Father's seventh post "final order" motion finally denotes an end to the litigation and b) the March 20th Order anticipated the application for attorney's fees based on the entire case. To the extent that fees may have been denied at each specific stage prior to the conclusion of the case, said denials were interim in nature and do not preclude the instant application for fees which covers the entire history of the case. The Court specifically considered the chart attached as Exhibit B to Father's Response, which Father

provided to illustrate that the Court considered granting attorney's fees in one of the 28 motions requesting attorney's fees. These motions, however, included a request for fees for specific motions and were not requesting fees after completion of the case.

Second, despite the March 20th warning to Father, Father continued to be unduly litigious. He filed thereafter, for example, a Motion to Strike, a Motion for Reargument, a frivolous Motion to Clarify the Status of Mother's first counsel, a Motion for Clarification and Relief based on allegedly newly discovered evidence, a second Motion for Reargument, two June 2006 letters on matters that had already been resolved in a prior Order and a prior letter respectively, a Motion for Relief for Judgment, a third Motion for Reargument, and a second Motion for Relief within three weeks of the prior one. All of these where filed within a five month period. Examples of Father's complaints in these pleadings including items such as the following:

> 1. Whether Father should have the children overnight on Thursdays since his time with Ryan on alternate Thursdays was limited because it allowed only sixty-five minutes of non-car time due/ in part, to Father's expectation that the therapy appointments were to continue on Thursday.
> 2. Whether a teleconference should be held in July of 2006 after the Court had

been repeatedly asked by Father not to hold teleconferences since Father was not satisfied with the quality of the recording when teleconferences were held. In this instance, the Court was available for a hearing, on short notice, but Father was on vacation so the Court scheduled a hearing for a much later date since Father requested one in his Affidavit. Father later complained and sought a teleconference.

3. The allocation of the expense for copying the transcript of Father's trial deposition which was ultimately not decided because income information requested by the Court was not provided. To the best of the Court's current recollection, the matter involved less than $400.

4. Father complained about the amount of time allowed for each side and presented inaccurate information regarding this. For example, he incorrectly claimed that Ms. Herzog testified for three and a half hours when she actually testified for one hour but another hour was allowed for Father to conduct a trial deposition outside of the hearing of the Judge and additional time was allowed that morning for Father's preparation to depose and cross examine Ms. Herzog. He complained that Mother's experts and Mother were allowed more time than Father and his experts when the differences were not

significant. Substantial time was needed to ascertain the time spent by each witness in six hearings in order to address these matters which were not accurately presented and were not germane to the basic issues in the case. The March 1, 2006 disposition discusses the detailed mathematical calculations which were performed.

In the instant case Father earned $10,000 in 2004, $15,000 in 2005 and apparently expects to earn $10,000 in 2006. He also had unearned income of $32,903 in 2005 and owns his home. He was involved in a family business for twenty three years and has, to the best of the Court's knowledge, continued to do some work for the subsequent owners but has no other outside employment. Among other items, Mother's counsel has set forth the following financial data regarding Father:

1. He belongs to the Wilmington Country Club where the base fees are $4,296 a year.
2. He pays $15,875 a year towards the children's tuition.
3. He owns a home in Westover Hills, purchased in 1996 for $360,000 with a mortgage of $320,000. Allegedly, the current listing price on a neighboring home is $689,000. Father, however, has explained that another house is listed for $629,000, which is still a substantial sum.

4. He had a Dean Witter/Morgan Stanley investment account worth $534,000 in September, 1997; a Wilmington Trust account worth 1.7 million dollars and a Money Market account worth $66,000 in October 1997. Father has, in turn, explained that Wilmington Trust account was worth $739,093.24, including the money market account. As in the case of the dispute regarding the comparable listing price for houses in Father's neighborhood, $739,093 is a substantial sum. To the extent that Father labels Mother's allegations as a continuation of Mother's "pattern of deception", Father has had an opportunity to correct any misinformation and has been minimally damaged by the expense of setting forth the correct dollar amounts in his Response to Motion for Award of Attorney's Fee.

The above allegations were set forth in a letter from Mother's counsel dated September 22, 2006, a copy of which was sent to Father's counsel. As has been consistent in this litigation, every single item has been hotly disputed and Father argues that the filing by Mother's counsel of a letter, instead of a motion, is a Rule 11 violation. The Court declines to make such a finding and notes, again, that Father was given an opportunity to reply, which he did in his Response to Motion

for Award of Attorney's fee at the last two pages of his Response.

Father attempted to rebut the information regarding his financial status also by indicating in a October 6, 2006 affidavit that he had a mortgage expense in 2005, without regard to county land tax, of $18,000 and "that the gross majority of assets are stocks that have an extremely low historic cost tax base that are rooted in inhertience (sic) from my predeccessors (sic)." The Court considered this information to the extent that it was disclosed since there was no indication of the tax impact of disposing of some of this stock if needed to satisfy any award of fees. The Court also considered that Father disclosed in the affidavit that he paid Mother $57/000 in cash at the time of their mediation and that only he is liable for "$160,000 PLUS upwards adjustments for C.P.I, toward four years college tuition for each child" while, according to him, Mother has "zero financial liability." The Court considered the financial information provided by Father, the sharing of the current tuition expenses by both parents and the fact that the oldest child is only thirteen and won't be attending college for another four or five years.

Mother, in turn, earns a base salary of $84,945 a year, expects a performance bonus of $50,000 in 2006, has a net take home pay of $81,803 and has monthly expenses of $9,291, According to her October 4, 2006 affidavit, she has incurred and paid $12,874 in attorney's fees in 2006 in addition to $1,300 per month

payments and, absent an award of fees, would expect to continue to pay $1,300 a month for the next two years. Since Mother lists a mortgage expense, the Court assumes that, like Father, Mother owns her home and does not rent.

The Court is aware that Mother initiated the litigation after the parties lived under a mediated agreement for two years. However, that is not held against her since it is clear to the Court from the evidence presented that there are valid reasons for why the mediated agreement was no longer in the children's best interest. The Court also considered that it ruled favorably in part on Father's motions in its decisions of June 16, 2006; July 12, 2006; July 26, 2006; August 8, 2006 and August 30, 2006. Nevertheless, the numerous motions filed by Father throughout the history of the case were still unduly litigious. The Court also considered that, as noted in the June 1, 2006 Order, at page 4, Mother lied under oath and that she was inconsistent in her request for an emergency hearing that was withdrawn and later sought again. While the change in Mother's position regarding the need for the emergency hearing is understandable and was explained at the time by counsel, it is undisputed that Father had to spend additional resources to depose Mother and prepare trial cross examination to expose her lack of candor. Father's partial success in the Motions noted above and

Mother's perjury account, in part, for the award to Mother being lower than what was requested by her.

The Court has considered the dates of admission to the Delaware Bar of the four attorneys in question, their hourly rates and the quality of work submitted by them both in terms of their writing and their courtroom performance. All rates were reasonable. The Court considered that Father's attorneys were admitted to the Bar much earlier than Mother's but the work from Mother's attorneys was better. The Court, in fact, alerted Father's attorney, at one point of the litigation that it suspected that, from the quality of Father's pleadings that Father was drafting at least part of them and cautioned counsel in that regard. The difference in quality of the pleadings can be seen, for example, by comparing Father's October 6, 2006 affidavit to Mother's October 4, 2006 affidavit.

Mother requested an award of fees and costs for $40,268, representing $19,025 for items specifically enumerated in the Motion for Award of Attorneys' Fees and $21,243 representing 50% of the balance incurred by Mother beyond the enumerated expenses. Although the Court reviewed carefully both the individual entries in the Motion and the Response, and the pleadings and the dispositions in the case, the Court does not break down its analysis in the way done by Mother's counsel. Instead, the Court looks at the case in its entirety and decides on an equitable allocation of the responsibility for

the excessive fees and costs incurred by Mother.

In spite of the fact that Mother earns significantly more income than Father, the Court awards her fees in the amount of $36,000, payable at the rate of $12,000 on the following dates: December 20, 2006; February 10, 2007 and April 10, 2007. At this point, the Court does not order the payment of interest. If any payment, however, is not timely, Mother's counsel may request the assessment of interest at the legal rate.

Despite this award, Mother will still be responsible for a significant amount of fees, totaling at least $25,511. This is a large amount since the basic issue in dispute was whether the children should continue under a shared residency arrangement or switch to something closer to the Standard Visitation Guidelines. Given the results obtained by Mother's counsel in the face of significant and unnecessary obstacles/ this award is reasonable. This award covers all pending fee matters before the Court.

This is a final Order.

/S/
AIDA WASERSTEIN, JUDGE

aw: jr
Michael Arrington, Esq.
Norman Levine, Esq.
File

The Family Court of the State of Delaware
In and For New Castle County
Civil Disposition – Judge

Petitioner	Attorney
Jamal Shufler	Norman E. Levine, Esq.

Respondent	Attorney
Judy Shufler	Michael W. Arrington, Esq.

Before The **Honorable Aida Waserstein**, Judge of The Family Court of the State of Delaware:

File No.	CN01-11049
Petition Nos.	03-33321
Nature of Proceeding	Motion for Reargument
Date of Hearings	NONE
Date of Decision	12/04/06

Before the **HONORABLE AIDA WASERSTEIN, JUDGE** of the Family Court of the State of Delaware:

Before the Court are the thirty nine paragraph Motion for Reargument filed by Jamal Shufler (Father) and the Response thereto filed by Judy Shufler (Mother). The Court has considered all the information presented in said pleadings and hereby amends its November 2, 2006 disposition on attorney's fees and costs (hereinafter "disposition"') only in reference to two items.

First, the disposition is amended to reflect that Father provided a total for the fees and costs incurred by him. While no total was provided in the bills attached to the Motion, the Court hereby acknowledges that a total was provided at paragraph 31 of the Motion. When doing the disposition, the Court relied on the bills attached to the Motion, rather than paragraph 31, and, on its own, estimated Father's total costs and fees. The Court had the approximate total in mind when it issued its disposition.

The Court further amends the disposition to reflect that 13 Del. C. §731, not 13 Del. C. §1515, governs attorney's fees in custody actions. However, the requirement that financial circumstances be considered is present in both statutes and the Court considered them in its disposition.

Other Matters

Father has reminded the Court that Dr. Romirowsky was the expert retained by Mother, not the children's therapist. The Court has been aware of Dr. Romirowsky's status throughout the proceedings and has now briefly reviewed the twenty six page custody decision of June 1, 2006. Although the Court sees a reference to Dr. Much as the expert retained by Father, the Court does not find a reference to Dr. Romirowsky being the children's therapist. If there is such a reference either in that, or any other decision, the Court is willing to correct it. Father, however, does not indicate where the alleged

error in designation was made. Regardless of Dr. Romirowsky's status, the Court's custody decision explains the three experts' testimony and the Court's findings regarding said testimony.

Despite Father's allegations at paragraph 5 of his Motion, the Court had sufficient financial information regarding Mother to make the decision on attorney's fees. To the extent that Mother provided incorrect financial information regarding Father, Father corrected said errors and the Court had the benefit of the corrected information.

Regarding paragraph 9 of the Motion, the Court notes that both attorneys, not just Mother's attorney, included copies of their billings to their clients. These provided detailed and important information to the Court.

To the extent that the remaining paragraphs of the Motion contain Father's disagreement with the Court's analysis on custody, transcription fees, use of teleconferences, etc., said matters can be presented to a higher court if they are germane since an appeal is pending. The Court declines to amend its findings regarding the award of attorney's fees based on these issues.

This is a final order.

IT IS SO ORDERED.

/S/_____
AIDA WASERSTEIN, JUDGE

AW: pmk

cc: Norman E. Levine, Esq.
Michael W. Arrington, Esq.
Delaware Supreme Court
File

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAL SHUFLER,
Respondent Below,
Appellant,
v.
JUDY SHUFLER,
Petitioner Below,
Appellee.

No. 455, 2006
Court Below – Family Court of the State of Delaware, in and foe New Castle County
C.A. No. CN01-11049

Submitted: April 4, 2007
Decided: May 8, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **BEGER**, Justices.

ORDER

This 8th day of May 2007, the Court having considered this matter, has determined that it is manifest on the face that the appeal is without merit because: to the extent the issues raised on appeal are factual, the record evidence supports the trial judge's factual findings; to the extent the errors alleged on appeal are attributed to an abuse of discretion, the record does not support those assertions; and to the extent that the issues raised on appeal are legal, they are controlled by settled Delaware law, which was properly applied.

Therefore, this Court has concluded that the final judgment of the Family Court should be affirmed on the basis of and for the reasons assigned by the Family Court in its decisions dated: June 1, 2006; July 26, 2006; November 2, 2006 and December 4, 2006.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Family Court be, and the same hereby is, AFFIRMED.

BY THE COURT:
/S/
Randy Holland, Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMAL SHUFLER,
Respondent Below,
Appellant,
v.
JUDY SHUFLER,
Petitioner Below,
Appellee.

No. 455, 2006
Court Below – Family Court of the State of Delaware, in and foe New Castle County
C.A. No. CN01-11049

Submitted: May 29, 2007
Decided: June 1, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **BEGER**, Justices.

ORDER

This first day of June 2007, it appears to the Court that:

1) The Court has carefully considered the Appellant's Motion for Reargument and the Appellee's Response. Before we entered our prior Order in this appeal on May 8, 2007, we carefully considered all of the interlocutory rulings that had been made by the Family Court in this proceeding.

2) The record reflects that this has been a highly emotional matter for both parties.

The record also reflects that the parties' anxiety was exacerbated by the protracted nature of the hearings. Nevertheless, in the final analysis, the Family Court was called upon to apply established legal precedents to the facts that were presented. We previously concluded that the Family Court had properly applied that well-established law to the facts in this case. The record also reflects that the Family Court was called upon to exercise its discretion in making several rulings. That exercise of discretion was influenced by the Family Court's assessment of the parties' and witnesses' credibility. Our prior Order concluded that there was no abuse of discretion.

3) The Appellant's Motion for Reargument reflects profound disappointment with the rulings of the Family Court. However, the record reflects that no reversible errors were committed. Hopefully, the parties will move forward with their lives in the best interest of their children, notwithstanding their personal differences.

4) We ratify and reaffirm our Order dated May 8, 2007.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Appellant's Motion for Reargument is Denied.

BY THE COURT:
/S/
Randy Holland, Justice

13 Del. C. § 722. Best interests of child.

(a) The Court shall determine the legal custody and residential arrangements for a child in accordance with the best interests of the child. In determining the best interests of the child, the Court shall consider all relevant factors including:

(1) The wishes of the child's parent or parents as to his or her custody and residential arrangements;

(2) The wishes of the child as to his or her custodian(s) and residential arrangements;

(3) The interaction and interrelationship of the child with his or her parents/ grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests;

(4) The child's adjustment to his or her home, school and community;

(5) The mental and physical health of all individuals involved;

(6) Past and present compliance by both parents with their rights and responsibilities to their child under § 701 of this title;

(7) Evidence of domestic violence as provided for in Chapter 7A of this title; and

(8) The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

(b) The Court shall not presume that a parent, because of his or her sex, is better qualified than the other parent to act as a joint or sole legal custodian for a child or as the child's primary residential parent, nor shall it consider conduct of a proposed sole or joint custodian or primary residential parent that does not affect his or her relationship with the child. (59 Del. Laws, c. 569, § 4; 67 Del. Laws, c. 236, §§ 2, 3; 69 Del. Laws, c. 309, § 3; 74 Del. Laws, c. 311, § 1.)

13 Del. C. § 731. Attorney's fees.

The Court from time to time, after considering the legal and factual basis for the action, the results obtained, the financial resources of the parties, and such other factors as the Court deems just and equitable, may order a party to pay all or part of the cost to another party of maintaining or defending any proceedings under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of such proceedings. The Court may order that the amount be paid directly to the attorney, who may enforce the order in his or her name. (59 Del. Laws, c. 569, § 4; 67 Del, Laws, c. 236, § 8; 70 Del. Laws, c. 186, § 1.)